Addis Ababa University

College of Law and Governance Studies

Resolution of construction disputes through institutional arbitration in Ethiopia: The practice and legal challenges.

By: - Kassahun Mulatu Gurmu.

Advisor: - Professor TilahunTeshome

A Thesis Submitted to School of Graduate Studies of Addis Ababa University in partial fulfillment of the requirements for degree of masters of law (LLM)in Business law

December, 2020

Addis Ababa, Ethiopia

Addis Ababa University College of Law and Governance Studies.

Resolution of construction disputes through institutional arbitration in Ethiopia: The practice and legal challenges.

By: - Kassahun Mulatu Gurmu.

Advisor: - Professor Tilahun Teshome

A Thesis Submitted to School of Graduate Studies of Addis Ababa University in Partial Fulfillment of the Requirement of Masters of law in Business law.

December, 2019
Addis Ababa

Declaration

I, Kassahun Mulatu Gurmu, declare this thesis is my original work and has not been submitted for a degree in any other University and all sources of materials used have been duly acknowledged.

Declared by

Name: - **Kassahun Mulatu Gurmu**

Signature_____

Date_____

Name of Advisor: - **Professor Tilahun Teshome**

Signature_____

Date_____

Acknowledgement

First, I would like to thank the almighty **God** for all success achieved including the accomplishment of this study. No word is equivalent to the blessings God gave to me.

My thesis advisor Professor **Tilahun Teshome** also deserves all the thanks for his valuable advice, direction, encouragement, humility and support.

I must also express my very profound gratitude to my wife **Senait Gashaw** and my son **Sona Kassahun** for providing me their valuable time, required support and continuous encouragement throughout my years of study and through the process of researching and writing this thesis. This accomplishment would not have been possible without their critical support.

Approval Sheet by the Board of Examiners

Resolution of construction disputes through institutional arbitration in Ethiopia: The practice and legal challenges.

Submitted to College of law and Governance studies of Addis Ababa University in partial fulfillment of the requirements of LLM Degree in Business Law.

By:kassahun Mulatu Gurmu.

Approved by board of Examiners.

	Name	**Signature.**
1. Advisor	**Professor Tilahun Teshome**	_____
2. Examiner	**Professor Zekarias Kenea**	_____
3. Examiner	**Fikadu Petros**	_____

Acronym

- AAA----------American Arbitration Association.
- AACCSA-AI----------Addis Ababa Chamber of Commerce and Sectoral Association Arbitral Institute.
- AFDB----------African Development Bank.
- AIA----------American Institute of Architect.
- BATCoDA----------Building and Transport Construction Design Authority office.
- DAB----------Dispute Adjudication Board.
- DRA----------Dispute Resolution Advisor
- DRB----------Dispute Review Board
- ECCSA-AI----------Ethiopian Chamber of Commerce and Sectoral Association Arbitral Center.
- EPC/Turnkey Projects----------Engineering, procurement and construction Turnkey projects.
- FDRE----------Federal Democratic Republic of Ethiopia.
- FIDIC ----------French acronym for the International Federation of Consulting Engineers.
- HIAC----------Hong Kong International Arbitration center.
- ICC----------International Chamber of commerce
- ICE----------Institution of Civil Engineers.
- LCIA----------London Court of international Arbitration
- MoWUD----------Ministry of Work and Urban Development
- UNCITRAL----------United Nation Commission on International Trade Law.
- PPPAA----------Public procurement and property administration Agency.
- QMUL----------Queen Merry University of London.
- SIAC----------Singapore International Arbitration center.

Abstract

Construction is a large, dynamic, complex and a very vital sector of economy in many countries. The industry has started to play a vital role for developing countries as they are considerably dependent on the growth and development of physical infrastructures. Similarly, the sector is a corner stone of the economy for Ethiopia. The complex nature of the construction industry and the existence of various players in the sector such as owners, suppliers, financiers, designers, contractors, consultants, employer representatives, sub contractors and other sector actors have made disputes in the industry normal and sometimes inevitable. Furthermore the sector transactions and disputes have peculiar features than any other sectors of commercial business. The sector transaction and dispute involve larger amount of money having multiple interested parties with independent contractual relationships and multiple claims and contain large volume of documents. Due to the inevitability of dispute in the sector, crafting an appropriate mechanism of dispute resolution has been considered as a significant task. The resolutions of the construction sector dispute mainly require skilled and experienced expertise and demand rapid resolution of disputes for the success of a project. A judge who is trained only in law without having the required knowledge and experience of construction sector works will not be able to understand the technically complex disputes of the sector. Moreover, resolving disputes occurring in the construction sector in time, swiftly and professionally contributes for the successful completion of projects with allocated budget, time and quality. Due to this various alternatives and on site dispute resolution mechanisms such as Dispute resolution advisor, Dispute review board, Dispute adjudication board, negotiation and arbitration are in place in different parts of the world to ensure justice and efficiency in resolving the sector specific disputes. At international level arbitration is highly advocated as the most efficient means of dispute resolution for construction disputes than the formal adjudication system. To assess the practice and challenges of construction dispute arbitration of institutional arbitration centers in Ethiopia, both legal framework and the institutional practice of Arbitration centers are analyzed by the study. However, in Ethiopia the practice of institutional arbitration is not considerable and well developed and the existing arbitration laws are not also comprehensive to fit the rapidly growing construction sector business and associated disputes. Therefore, enacting comprehensive legal framework, policies and establishing strong arbitration centers which serve the country and the rest of the world is suggested as major recommendation.

Table of Contents

Declaration ..... **I**

Acknowledgement ..... **II**

Approval Sheet by the Board of Examiners ..... **III**

Acronym ..... **IV**

Abstract ..... **V**

Chapter One **1**

1. Introduction **1**

2. Statement of the problem **4**

3. Research Questions **7**

4. Objectives of the study **7**

5. Significance of the study **7**

6. Scope of the study **8**

7. Methodology of the study **8**

8. Limitation of the study **9**

Chapter Two **10**

2. General overview of disputes in the construction sector and its resolution mechanisms. **10**

2.1. Disputes in the construction industry. 10

2.2. Dispute resolution options in the construction industry and in standard conditions of construction contract. 11

2.2.1. Dispute resolution options in the construction industry. 11

2.2.2. Settlement of construction dispute in standard conditions of construction contract. 12

A. Settlement of construction dispute in international standard conditions of construction contract. 12

I. FIDIC 13

II. ICE Conditions of Contract, 7th Edition: July 2004. 14

III. The American Institute of Architect General Conditions of Contract for Construction (AIA's A201 - 2007 General Conditions of Contract for Construction) 14

IV. The World Bank Standard Bidding Document (SBDW) 15

V. The African Development Bank Standard terms and conditions of contract for works. 16

B. Settlement of dispute in Ethiopia standard conditions of construction contract. 16

2.3. The on-site dispute avoidance and resolution mechanisms in the construction sector. 17

I. Dispute Review Board (DRB) 18

II. Dispute Adjudication Board (DAB) 19

2.4. Basic Features of Construction dispute Arbitration. 21
2.5. International Arbitration of Construction Disputes 21

Chapter Three 24

3. The legal Framework and Practice of Institutional Arbitration in Ethiopia: Focus on Construction Dispute Resolution. **24**
3.1. The legal framework of Institutional arbitration in Ethiopia 24
3.1.1. The agreement to Arbitration 26
3.1.2. The law and the practice of establishing arbitral Tribunal in Ethiopia. 27
3.1.3. The law of arbitration proceeding in Ethiopia. 28
3.1.4. The legal space for the interface of institutional arbitration and courts in Ethiopia 30
3.1.5. The rules and practices of setting aside and appeal of arbitral award in Ethiopia. 32
3.1.6. The rules and practices of recognition and enforcement of the arbitral award in Ethiopia. 34
3.2. The practice of Institutional arbitration in Ethiopia in resolving construction disputes. 35
3.2.1. Construction dispute arbitration practice in Arbitral institutions of Ethiopia; the case of Addis Ababa Chamber of Commerce Arbitral Institute. 37
I. The legal and practical experiences of initiating institutional arbitration proceeding for construction disputes in Ethiopia. 38
II. The legal and practical experiences of establishing an arbitral tribunal for construction disputes in institutional arbitrations of Ethiopia. 41
III. The legal and practical experiences of the arbitral proceeding for construction disputes in institutional arbitrations of Ethiopia; The case of AACCSA-AI. 43
IV. The legal and practical experiences of giving an arbitral award in institutional arbitration of Ethiopia for construction disputes; the case of AACCSA-AI. 45
V. The legal and practical experiences of recognizing and enforcing arbitral awards in Ethiopia. 45

Chapter Four 47

4. Conclusion and Recommendation **47**
4.2. Conclusion. 47
4.3. Recommendation 49
Biblography ..... **Error! Bookmark not defined.**

Chapter One

1. Introduction

Construction is a large, dynamic, complex and a very vital sector of economy in many countries.[1]The construction industry has been serving as a major contributor to economic growth worldwide.[2] It encounters very complex practices, which includes, works such as construction, restoration, installation, repair, maintenance and dismantling of all services and prefabricated customized components and destruction of buildings on, above or below ground.[3] It also contains all the essential preparatory work such as site clearance, foundations, scaffolding and cranes and all the finishing works (painting, decorating, cleaning, etc). Building of roads, runways, railways, canals, pipelines, electricity, water and telecommunications pipe work and drainage works are also main parts of construction works.[4]

Internationally, one of the major sectors that accounts for a considerable percentage of the Gross Domestic Product (GDP) in various nations is the construction industry.[5]

The construction industry in Ethiopia has been developing tremendously since 2001.[6] Recent studies indicated that the GDP contribution of the industry has been raised to 5.6% and approaches to the sub Saharan average (6%).[7]Expansion of economic infrastructure such as railways, roads, telecom, power, irrigation and high rise building has been increasing from time to time.[8] Significant amount of the country's budget is also allocated to economic

[1]Oladinrin, T. O, Ogunsemi, D. R. and Aje, I. O, "role of construction sector in economic growth, empirical evidence from Nigeria", Futy Journal of the Environment , Vol. 7, No. 1, July 2012, p. 50.
[2] Ibid.
[3]Doaa Khalil Yousef Abu Jbara, evaluation and improvement of arbitration procedures in the engineering arbitration centre in the Gaza Strip, The Islamic University-Gaza Deanery of Higher Studies Faculty of Engineering, thesis Submitted in Partial Fulfillment of the Requirements for Degree of Master of Science in engineering projects management 2012, p.2.
[4] Ibid
[5]Marzooq Abdul Karim Selam, The dispute in the construction industry in the Kingdom of Bahrain with a view to developing a dispute mitigation strategy, MSC thesis submitted at University of Salford, UK, 2014-2015, p. 7.
[6]Tadesse Ayalew, M. Zakari aDakhli and Pr. Zoubeir Lafhaj, "Assessment on Performance and Challenges of Ethiopian Construction Industry", Journal of Architecture and Civil Engineering Volume 2, issue 11, (2016), p. 2.
[7]Ibid.
[8]Admasu Shiferaw, "Productive Capacity and Economic Growth in Ethiopia", Department of Economic & Social Affairs, College of William and Mary Williamsburg, Virginia, April 2017, p.3.

development through financing infrastructural developments of education, health, water, transport and power projects.[9]

The complex nature of the construction industry and the existence of various players in the sector such as owners, suppliers, financiers, designers, contractors, consultants, employer representatives and other sector actors have made disputes in construction industry normal and sometimes inevitable.[10]In many cases, disputes happening in the sector require active resolution for the progress of the works and its completion. Due to this putting appropriate dispute resolution mechanism has been considered as vital for the efficiency and sustainable development of the sector.[11]Considering the relevance of appropriate dispute resolution of construction disputes, various mechanisms and procedures of alternative dispute resolution which are also sector specific has been in practice.[12]However, in all cases, prevention and mitigation of the sector dispute is always a priority but in many circumstances various claims may not be solved by those mechanisms provided for dispute mitigation and prevention.[13] There are a lot of instances where construction disputes are solved either by arbitration or litigation.

International parties such as transnational companies involved in the construction sector mainly prefer arbitration than court litigation to resolve a dispute arising in the sector.[14]The prevalence of arbitration clauses in standard forms of contract, the technical content of disputes, the need for skilled arbitrators in technical disciplines are also other cited rationales for the preference of arbitration as a dispute resolution mechanism for construction sector disputes.[15]So, institutional arbitration centers are widely preferable for solving construction disputes involving multinational companies than the formal court system. [16]

The involvement of multinational companies in Ethiopia construction industry has been increasing from time to time. Contractors, consultant, designers and various actors of the

[9] Ibid.
[10]Badmos-Raji Barakah A, the conceptual framework of modern construction dispute resolution in Nigerian construction industry, p. 141-142.

[11] Id, p. 142.
[12] Ibid.
[13] Ibid.
[14]David Kiefer and Adrian Cole, the guide to construction Arbitration, Suitability of Arbitration Rules for Construction Disputes, Global Arbitration review, 2017, p. 81.
[15]Sundra Rajoo, Arbitration in the construction industry, Master Builders, p. 72.
[16]Badmos, supra note 10, p. IV.

sectors from different countries have become main players in the country's construction industry.[17]These foreign companies prefer to use dispute resolution mechanisms outside the local court system and mainly put contractual provision which refer their cases to prominent international arbitration institutions for resolving any potential disputes.[18] It is only in rare case in which foreign companies of the sector opt to use the local public justice.

Across the globe prominent arbitration centers are established and widely serving as a dispute resolution institutions.[19] Similarly, a lot of African countries such as Kenya, Egypt, Uganda, Ghana and Tanzania are also trying to serve as a seat of international arbitration by establishing strong arbitral institutions and adopting model international arbitration rules such as UNICTRAL model arbitration rules, convention on the settlement of investment disputes and New York Convention on recognition and enforcement of arbitral awards.[20]

Since international trade is a useful and strategic global economic instrument for all countries, the international business community has strong desire to solve their commercial disputes with less cost, with shortened time and flexible procedure outside the court system.[21] Due to this government, professional and business community in all countries have their own interest in establishing functional international arbitration institution in their jurisdiction.[22] The Ethiopian case is not different from other states. As a reflection, Ethiopian government has officially established a Chamber of Commerce and Sectoral associations which have power inter alia, to solve commercial disputes through arbitration. However, in Ethiopia arbitral institutions has not been properly functional and developed like the practices seen in other countries. So studying the legal and practical challenges of the arbitration institutions in solving construction disputes through arbitration is essential to identify gaps and recommend the way out.

[17]Abebe Dinku and Girmay Kahssay, "Claims in international construction projects in Ethiopia and case studies in selected projects", Department of Civil Engineering Addis Ababa University, Journal of EEA, Vol 20, 2003, p. 4.
[18]For instance Chinese and Turkish EPC Turnkey contractors who entered in to contract with Ethiopian government to construct five railway projects with contract value of more than five billion USD has preferred to resolve their disputes through international arbitration institutions such as LCIA, ICC AND SIAC.
[19]Kariuki Muigua, Reawakening arbitral institutions for development of arbitration in Africa, Paper presented at Arbitration institutions in Africa conference, 2015, p.3.
[20] Mayer Brown, International Arbitration in Africa, Growth, developments and trends, 2017, pp.12-13. See also Kariuki Muigua, supra note 19, pp. 4-11.
[21]Kariuki Muigua, Supra note 19, p.3.
[22] Ibid.

2. Statement of the problem

Though the construction industry is an important part of the economy of any country, the sector is highly subjected to conflict between the various parties involved in the sector.[23]Study indicates as dispute in the construction sector activities are inherent to the nature of the work.[24]Since conflicts in construction projects are seen as an inevitable practice, resolving them through appropriate and efficient mechanism has paramount importance.[25] Resolving disputes occurring in the construction sector in time, swiftly and professionally highly contributes for the successful completion of projects with allocated budget, time and quality.[26] However, unresolved construction disputes have a consequence impacting the wider public social, economic and political spheres.[27]

Resolving the disputes surrounding the sector highly demands adjudicator who has sector specific knowledge and experience.[28] A judge who is trained only in law without having the required knowledge and experience of construction sector works will not be able to understand the technically complex disputes of the sector.[29] Due to this other alternative dispute resolution mechanisms including institutional arbitration are in place in different parts of the world to ensure justice and efficiency in resolving such sector specific dispute which require special knowledge and experiences.[30]

At international arena arbitration is highly advocated as the most efficient means of conflict resolution for construction disputes than the formal adjudication system.[31] Various attributes of arbitration are taken as a positive input for the successful resolution of construction disputes for both national and international construction projects.[32] Famous international

[23]Sagar Soni, Mukesh Pandey and Sohit Agrawal, "Conflicts and Disputes in Construction Projects: An Overview", International Journal of Engineering Research and Applications, July 2017, p. 40.
[24] Ibid
[25]Owolabi James D, Amusan Lekan M, et al, "causes and effect of delay on project construction delivery time", International Journal of Education and Research, Vol. 2 No. 4 April 2014, p. 198
[26] Ibid.
[27] Ibid.
[28] Michael J. Elliott, "Arbitration and the Construction Industry", 3 Glendale L. Rev, Vol, 29, 1978, pp. 30-31.

[29] Ibid.
[30] Id, p. 30.
[31]David Kiefer and Adrian Cole, supra note 14, p.81.
[32] Ibid.

arbitration institutions such as ICC, LCIA, SIAC, HIAC and AAA[33] have been handling more construction cases than any other specific commercial sector cases.[34]Even at domestic level construction disputes occupy relatively the larger case load of institutional arbitration in different nations.[35] In Ethiopia too, the Addis Ababa chamber of commerce who was the sole institutional arbitrator for long and has been relatively the dominant arbitral institution entertains more construction disputes than other specific commercial cases.[36]

However, in Ethiopia still courts are the dominant justice serving institution of the country since the 1940s. But, study shows as the court system are inefficient, problem-fraught, congested, corrupted, lacks independence, not accessible and responsive for the poor.[37]Like many developing countries, state courts in Ethiopia are notorious in time-consuming, in terms of cost and unpredictability. Public courts do not also provide a win-win solution and maintain the good relationship of the parties. These all facts indicate that institutional arbitration is becoming increasingly important in the justice system of many countries for solving construction disputes. Studies conducted in different countries have shown that, compared to formal court systems, using institutional arbitration to resolve construction disputes will result inexpert based, timely and cost- effective decision.[38]Due to this many nations has began to properly support their arbitration system with the appropriate legal framework, establishing strong arbitration institutions and creating sufficient awareness of stakeholders on its advantages, disadvantages and its link with formal courts. But all these tasks have not been done at the required level in Ethiopia. Compared to other countries, the practice of institutional arbitration is not considerable in Ethiopia. Both in number and in practice arbitral institution has no visible place in the justice system of the country. There are also claims which allege as the alternative dispute resolution system in general and that of arbitration are not properly backed by the gov't and relevant stakeholders. In reality, the local

[33] ICC refers International Chamber of Commerce, LCIA refers London Court of International Arbitration, SIAC refers Singapore International Arbitration Center, HIAC refers Hong Cong International Arbitration Center and AAA refers American Arbitration Association.
[34] Michael J. Elliott, supra note 28, pp. 30-31.
[35]David Kiefer and Adrian Cole, supra note 14, p. 81
[36] The 2016, 2017 and 2018 report of the Addis Ababa Chamber of Commerce and Sectoral Association Arbitral Institution. The report is presented by Yohannis W/Gebriel who is Director of the Arbitration institute of Addis Ababa Chamber of Commerce and Sectoral Association.
[37]Hailegabriel G. Feyissa, "the role of Ethiopian courts in commercial arbitration", Mizan Law Review, Vol. 4 No.2, Autumn, 2010, p. 46.

[38]David Kiefer and Adrian Cole, supra note 14, pp. 81-82.

business community lacks the required awareness on the role and function of arbitration. Due to this the business community mainly uses the formal court system to get justice by wasting resource and time. This situation has created a lot of overcrowding and back logs up on courts in their effort to deliver swift and timely justice.

Therefore, setting up a functional legal framework which enables the establishment and proper functioning of institutionalized commercial arbitration centre in the country demands the contribution of all stakeholders.[39]In the current globalized world, the formal justice system which is established under a single national jurisdiction will not be neutral, legitimate and competent to solve disputes or transactions involving multinational transactions.[40] Giant multinational construction companies who have the capital and technological capacity to carry out different development activities and who can contribute for the knowledge and technology transfer, looks the existence of strong institutional arbitration as one positive trait for their decision to invest in foreign countries. Currently, in Ethiopia there are a number of international and multinational giant business enterprises involved in construction sector as financer, contractor, supplier, consultant and various firms working on construction related business. In the absence of strong institutional arbitration, it will be difficult to retain and expand the role of foreign investments. Taking in to consideration the existing reality of the country and that of the world, the country needs to establishes, inter alia, efficient, modernized and commercial arbitration legal frame work which is essential for institutionalized arbitrations that complement the public justice system. Furthermore, the country needs to examine existing laws and arbitration centers and make them compatible with the existing situation of the country and the globe.

In Ethiopia, only three institutionalized commercial arbitration centers are in practice. These institutions include; Addis Ababa Chamber of Commerce and Sectoral Association Arbitration Institute, Bahir Dar University Arbitration Center and Ethiopian Chamber of Commerce and Sectoral Association Arbitration Institute. Among the three arbitration centers, two of them are recently established centers which are not well known publicly and which are also at the commencement stage. None of them have a branch out of their principal business place. The arbitral centers are not yet widely utilized by the public. The country

[39] Ibid.
[40] Id, p. 81.

could not also get the necessary benefits expected from the sector. Due to the above all stated reasons, it is crucial to analyze the legal and practical challenges of solving commercial disputes through institutional arbitration in Ethiopia in general and specifically that of construction disputes.

3. Research Questions

The Study will provide answer for the following research questions:-

- Is there an arbitration-friendly policy and legal framework for the establishment and proper functioning of institutional arbitration in Ethiopia? Specifically in relation to the laws, the involvement of courts in arbitration, the support of government and business community?
- What are the apparent legal gaps and practical challenges of solving construction disputes through institutional Arbitration in Ethiopia?
- Are institutional arbitration centers in Ethiopia the preferable choice of both national and international construction sector actors for resolving disputes?

4. Objectives of the study

In the first place, the study has examined the existence of an arbitration friendly policy and legal framework in the country for the establishment and proper functioning of institutional arbitration centers. Then, the study has explored the apparent legal and practical challenges which have been happening in the country in solving construction disputes through institutional arbitration. After examining the policy, the legal and practical challenges which are visible in the country in solving construction disputes through institutional arbitration, the study has provided recommendation to alleviate basic legal gaps and practical problems identified by the study.

5. Significance of the study

The research has the following importance:-

1. The study identifies the existing policy gap, the legal and practical challenges happening in the country in resolving construction disputes through institutional arbitration.

2. It serves as a one reference document for policy and lawmakers to make the necessary policy and legal reform on challenges related with solving construction disputes through institutional arbitration.
3. The study can provide a basic awareness for any concerned body in relation to the existing status of solving construction disputes through institutional arbitration in Ethiopia.
4. The study also serves for other researchers as a springboard to conduct detail study on the subject matter.

6. Scope of the study

The study exhaustively investigates and reveals the legal and practical challenges observed in Ethiopia during resolution of construction disputes through institutional arbitration. Accordingly, pertinent laws of the country are examined to identify as the existing legal framework is supportive and sufficient to effectively resolve construction disputes through institutional arbitration. In order to analyze the practice of solving construction disputes of the institutional arbitration in the country, the study has assessed the case experiences of arbitration institutions available in the country.

7. Methodology of the study

The study examined the legal and practical challenges of solving construction disputes through institutional arbitration in Ethiopian using both primary and secondary sources of data. The study used data's of interviews made with personnel of the concerned organ and examined relevant laws as a primary source of data. Books, articles, cases, documents and previously conducted researches are utilized as a secondary source of data. The study has also made a case analysis basing on the arbitration process and judgments made on construction disputes handled by the arbitration institutions available in the country. Furthermore, the study has also examined the way courts interface with arbitral institutions to support and facilitate an effective resolution of disputes and the extent courts are collaborative to enforce arbitral decisions. To assess the level of court intervention in the overall process of institutional arbitration, one federal high court civil bench which is Lideta Federal High court is selected based on purposive sampling.

The study has a nature of qualitative research for the fact that it has devoted on the reasons, justifications or logical arguments of legal provisions and available cases to show the legal

and practical challenges happening in solving construction disputes through institutional arbitration.

8. Limitation of the study

Lack of previously conducted related researches which are specifically conducted basing on our country experience is one of the limitations the study has faced. In addition to the existing few general arbitration laws of the country, the lack of rich practical experience of institutional arbitration in general and that of construction dispute arbitrations specifically was also one of the constraints faced by the study to make deep practical analysis on the research area. Furthermore, due to the confidentiality nature of arbitration process and its decisions the study has faced difficulties in accessing some pending and decided arbitration cases available in the arbitral institution. However, the researcher has made all possible effort within its reach to overcome the limitations which the study has faced.

Chapter Two

2. General overview of disputes in the construction sector and its resolution mechanisms.

2.1. Disputes in the construction industry.

Construction disputes are defined by the International chamber of commerce as "all kinds of disputes arising out of construction project works such as in particular civil, mechanical and engineering services, and those works necessary for the implementation of a construction projects".[41]

Usually construction project design or contractual arrangements are not perfect.[42]Due to this disputes are inevitable in construction projects.[43]In practice poorly prepared contract, technical complexity of the contract, improper allocation of risks and responsibilities in between parties, defective design and weak project organization from the outset starts to complicate the party's relationship and make the parties vulnerable to conflict of interests.[44]

The most common disputes associated with the industry are delay of supply material, works done outside the scope, delay of payments for completed work, improper construction methodology, delay caused by the subcontractor and discrepancies in contract documents between the various parties.[45] Owners financial constraint, price inflation, design change by client, defective design, weather conditions and defective construction work are also exhibited as a root causes of dispute in the sector.[46]Due to this disputes are frequently reflected in construction industry and the industry has often been described as one of the most adversarial and a problem prone industry, where claims and disputes are frequently considered as the rule rather than the exception.[47]

---

[41]Falilat Olubunmi Idowuetal, "An evaluation of the use of ADR in the Nigerian public construction project disputes", International Journal of Sustainable Construction Engineering & Technology (ISSN: 2180-3242), Vol 6, No 1, 2015, p. 17.

[42] Peter Fenn and Rod Gameson, Construction conflict management and resolution, University of Manchester Institute of Science and Technology (UMIST), Published by E & F N Spon, an imprint of Chapman & Hall, 1992, p. 6.

[43] Ibid.

[44] Queen Marry University of London and Pinsent Masons LLP, International arbitration survey –driving efficiency in international construction disputes, how can international construction disputes be resolved more efficiently whilst maintaining fairness and access to justice? 2019, p. 7.

[45] Ibid.

[46] Noor Mohamed Mohmed Nihaaj, Critical analysis of arbitration method used in the construction industry in Sirilanka, Department of Civil Engineering University of Moratuwa, Sri Lanka, thesis for Master of Science in Construction Project Management, p. 15..

[47]Badmos-Raji Barakah A, supra note 10, p.141.

These all disputes results in delay of the project, causing extra time and costs.[48]So, unduly settled construction disputes will leads to termination without proper completion of the project and meeting its purpose and worsening the negative relation of parties involved in the contract.[49]

2.2. Dispute resolution options in the construction industry and in standard conditions of construction contract.

2.2.1. Dispute resolution options in the construction industry.

Dispute resolution, in its widest sense, includes any process which can be employed to bring a solution for a dispute. The importance of dispute resolution in the construction industry is highly recognized by many stakeholders across the world.[50]Construction disputes must be resolved as quickly as possible to preserve professional relationships and the continuity of the commercial construction business.[51]A different study shows that most conflicts in the construction industry may appear to be minor in nature at the initial stage but if not handled properly it can result in claims, counterclaims, disputes, and termination of projects.[52]As in the case of any other commercial relationship, dispute prevention mechanisms are always the most advisable option for the construction sector than the dispute resolution methods.[53] However, dispute prevention is not always practicable.

Different dispute resolution techniques ranging from the most informal negotiations to that of a full court hearing with strict rules of procedure are identified as a dispute resolution mechanism of the sector.[54]These procedures include negotiation, mediation, conciliation, neutral evaluation, expert determination, adjudication, arbitration and litigation.[55]Study suggests as attempting to resolve construction disputes before they are reaching to arbitration and litigation more preferable.[56]Because construction litigation is not recommended and has been described repeatedly as expensive, time-consuming, fraught with flaws and a rigid process that ends with

[48] Ibid.
[49] Noor Mohamed Mohmed Nihaaj, supra note 46, p.16.
[50] Kathleen M.J Harmon, "resolution of construction disputes; a review of current methodologies", Leadership and Management in Engineering, October 2003, p. 189.
[51] Ibid.
[52] Edwin H.W. Chan and Henry C.H. Suen, Dispute resolution management for international construction projects in China, www.emeraldinsight.com/0025-1747.htm, 2004, p. 593.
[53] Noor Mohamed Mohmed Nihaaj, supra note 46, p. 20.
[54] Id, p. 17.
[55] Id, p 20.
[56] Ibid.

the ‘‘winner’’ sometimes being the ‘‘loser”.[57]Specifically, professional institutions working in the construction sector do not advise court litigation as appropriate means for resolving the sector dispute. For instance, Construction Industry Institute (CII) believes litigation as inappropriate means for resolving conflicts in construction sector and suggests it as the last resort.[58]

2.2.2. Settlement of construction dispute in standard conditions of construction contract.

A. Settlement of construction dispute in international standard conditions of construction contract.

Standard forms of construction contracts are in advance prepared contract documents where all the legal or contractual terms and basic parties' responsibilities were previously set.[59] Almost all general conditions of contract include provisions pertaining to many issues, particularly: defining roles, rights, responsibility, accountability, and authorities that are needed to execute contractually agreed works.[60] General conditions of contract in construction are being standardized by several international bodies through standard forms of contract which are considered to be ready made terms and conditions to be used when making a contract.[61] The standardization of the general conditions has numerous advantages, including saving preparation time, avoiding omissions, eliminating controversial language, avoiding misinterpretation among parties, achieving consistency in courts of law by building familiarity through general and frequent use, and avoiding misunderstandings as these documents have an adequate level of detail.[62] Different standard international construction contract documents put different kinds of dispute resolution mechanisms for the parties engaging in the contract.

Prominent professional institutions of the construction sector across the globe and international organizations like World Bank and African Development Bank have developed standard general conditions of construction contract providing different forms of dispute resolution options including arbitration for resolving claims arising in the construction sector.

---

[57] Kathleen M.J Harmon, supra note 50, p.189.
[58]Id, p.188.
[59]Samer MA Sadek, managing standard construction contractual forms modifications in the Middle East- overview and recommendations, School of Built Environment, University of Salford, UK, submitted for the partial fulfillment of the requirements of the Degree of Doctor of Philosophy, June 2016, p.10.
[60] Id, p. 3.
[61] Ibid.
[62] Id, pp.23-24.

Therefore, the major international standard construction contracts which have wider application currently in different parts of the world are discussed in the following section focusing on their dispute resolution clauses.

I. FIDIC

FIDIC, which is known as the International Federation of Consulting Engineers, prepares standard forms of contract for civil engineering construction which has been in use throughout the world.[63] FIDIC contracts are often referred to as the international standard for construction works.[64] The different kinds of standard conditions of construction contracts which are designed by FIDIC are crafted in such a way to suit different situations of construction project implementation.[65] The latest edition of FIDIC standard conditions of construction contracts are the following:-

- Conditions of Contract for Construction (Second Edition, 2017) the Red Book.
- Conditions of Contract for Plant and Design-Build (Second Edition, 2017) the Yellow Book.
- Conditions of Contract for EPC/Turnkey Projects (Second Edition, 2017) the Silver Book.
- Short Form of Contract (First Edition, 1999) The Green Book.

Before the latest second editions of the 2017 FIDC contracts, there were first editions of FIDIC which were released in 1999 and which have been in use in different jurisdictions. Substantially, the first and the second editions of FIDIC conditions of contracts are almost similar. But there are some revisions made in the second edition. All the above mentioned FIDIC standard conditions of contracts suggest arbitration as the final suitable means of resolving disputes arising in the construction projects.[66] However, FIDIC standard conditions of contracts recommend the usage of both binding and non binding means of

[63]Nishith Desai Associates, Construction disputes in India, April, 2020, p. 9.
[64] Ibid.
[65] Ibid.
[66] Eugenio Zoppis, "DAB and dispute resolution under the 2017FIDIC forms of contract", Center for Construction Law and Dispute Resolution King's College, London, September, 2018, p. 8.

dispute resolution mechanisms such as determination by the engineer, negotiation and dispute adjudication board in the first place before reaching to the stage of arbitration.[67]

II. ICE Conditions of Contract, 7th Edition: July 2004.

The Institution of Civil Engineers, commonly called ICE is an organization in which its members are from different parts of the continent in the field of civil engineering.[68] The ICE standard construction contract is a family of standard conditions with the forms ICE conditions of contract, the ICE design and construct conditions of contract and the ICE conditions of contract for minor works.[69]Dispute resolution methods are stated under clause 66 of the seventh edition of ICE standard conditions of construction contract. Under this revised clause there are three ways of resolving disputes arising in the construction sector. The first stage of dispute resolution is a resolution of dispute by engineer's decision.[70] Once decision is given by the engineer on the dispute arisen between the parties either of the party can require the dispute to be put to a conciliation process.[71] The conciliation process will be requested after the receipt of the engineer's decision and before reference to arbitration.[72] Then either party has the right to refer a dispute on a matter within the contract to adjudication.[73] The adjudicator's decision shall be binding until finally determined by legal proceedings or arbitration.[74]

III. The American Institute of Architect General Conditions of Contract for Construction (AIA's A201 - 2007 General Conditions of Contract for Construction)

AIA Document A201–2007 is adopted by reference to owner/architect, owner/contractor, and contractor/subcontractor agreements in the Conventional (A201) family of documents. Due to this the document is often described as the "keystone" document.[75]

Claims and dispute resolution mechanisms in American Institute of Architect General Conditions of the Contract for Construction are addressed in its clause 15. As per this clause

[67]Id, p. 6-11.
[68]Samer MA Sadek, supra note 59, p. 12.
[69] Ibid.
[70] Brian Eggleston, "The ICE conditions of contract": Seventh edition, Black Well Science, p. 371.
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Ibid.
[75]Samer MA Sadek, supra note 59, p. 11.

the initial decision maker for dispute resolution is the engineer.[76] However, the engineer shall make a decision only in cases when the parties have failed to reach agreement through negotiation.[77] Once the engineer has passed a decision on disputed contractual terms, the dissatisfied party may proceed to the next mechanisms of dispute resolution which are mediation and arbitration.[78]As per this standard document, both mediation and arbitration of construction disputes will be administered in accordance with the American Arbitration Association's Construction Industry Arbitration Rules.[79] The document provides that the settlement of disputes through arbitration will be final and enforceable by courts of law.[80]

IV. The World Bank Standard Bidding Document (SBDW)

In 1985, the World Bank, who is the largest financing agency at the international level, produced bidding documents for the procurement of works of civil engineering construction in the form of sample documents. These sample documents were upgraded by the Bank to a standard bidding documents in January 1995, The document is assumed as it is incorporated valuable international experience gained during the intervening period and have made their use mandatory in all contracts of construction works financed in whole or in part by the World Bank and whose cost is estimated to be more than USD 10 million.

The sample standard document of the World Bank provides that all disputes of construction contracts are to be settled by the Dispute review Board (DRB) in the first place.[81] Accordingly, if the Board has issued a Recommendation to the Employer and the Contractor and either of the parties has no intention to commence arbitration within a period stated in the contract, the recommendation shall become final and binding upon the Employer and the contractor.[82] However, when the decision or recommendation of the DRB is contested by either of the party and failed to be implemented, it will be finally settled by arbitration under the UNCITRAL Arbitration Rules.[83]

[76] The American Institute of Architect General Conditions of Contract for Construction (AIA's A201 - 2007 General Conditions of the Contract for Construction), clause 15.
[77] Ibid.
[78] Ibid.
[79] Ibid.
[80] Ibid.
[81] World Bank Standard Bidding Document for Works, January, 2017, clause 21.
[82] Ibid.
[83] Ibid.

V. The African Development Bank Standard terms and conditions of contract for works.

The African Development Bank has developed rules and procedures for the procurement of goods and works. The standard rule provided by the AFDB conditions of contract under its clause 2.43 provides that the dispute settlement mechanism for the construction contract to include dispute review boards or adjudicators for the speedy resolution of disputes.[84] The AFDB rule also clearly provides that international commercial arbitration has practical advantages over other methods for the settlement of construction disputes and recommends borrowers to use international arbitration to resolve dispute arising in the construction industry.[85]

B. Settlement of dispute in Ethiopia standard conditions of construction contract.

In Ethiopia, there are certain standard construction works bidding documents which had been in place as well as is still in use for the procurement of works and engineering services. These documents are mainly developed by agencies and institutions of government. The main ones are:-

- The Standard Conditions of Contract for Construction of Civil Work projects that was authored by the Ministry of Works and Urban Development in May 1994;
- BATCoDA[86] Standard Conditions of Consulting Services for Design and Supervision of Construction Works, January 1990.
- The Standard Bidding Document for the Procurement of Works, issued by the Public Procurement Agency (PPA),[87] August 2011.

The Standard Conditions of Construction Contract developed by the former Ministry of Works and Urban Development under its clause 67 has provision which deals with settlement of disputes. As per this provision the engineer is empowered to decide on disputes in the first place. But if either of the parties expresses their grievance on the decision given by the engineer within

[84] African development bank, Rules and procedures for procurement of goods and works, revised July 2012 edition, p. 18.
[85] Ibid.
[86] BATCoDA is an acronym and stands for Building and Transport Construction Design Authority office.
[87] The PPPA (Public Procurement and Property Administration Agency) is established under the Ministry of finance by virtue of the Federal Public Procurement Proclamation No.430/1997, and it is mandated, inter alia, to supervise and audit whether all Federal procurements are carried out in accordance with the Public Procurement Proclamation and the Directives.

90 days, they may bring their case to the Ministry of Works and Urban Development through appeal. Then it provides as the decision of MoWUDis final and binding. In comparison with international practices, the settlement of disputes preferred by the Standard Conditions of Contract prepared by MoWUD is unique and unusual. Since, MoWUD is an administrative organ of the government, its independence will be questioned mainly when either of the parties involved in dispute is a public agencies. Furthermore, the practice of most of international standard conditions of construction contracts shows that the discretion of choosing the arbitrators or the arbitral institutions is left to the parties. In this regard, it is suggested that the MoWUD standard conditions of a contract would have left the choosing of arbitrators and the arbitral institutions to the parties.

The current applicable general conditions of construction contract in Ethiopia is the standard bid document of works issued by Public Procurement and Property Administration Agency (PPPAA) in August, 2011. According to clause 26 of this standard condition of contract, the Public Body and the Contractor shall make every effort to resolve amicably by direct informal negotiation any disagreement, controversy or dispute arising between them under or in connection with the Contract or interpretation thereof. If the dispute is not solved by the informal negotiation, each of the Public Body and the Contractor shall appoint more senior representatives for the sole purpose of resolving the matter in dispute. If the Parties fail to resolve such a dispute or difference amicably within twenty-eight (28) days from the commencement of such procedure, either party may require that the dispute be referred for resolution through the courts in accordance with Ethiopian Law. But those Public Bodies that are allowed by law to proceed to arbitration have the right to settle their dispute by arbitration. Except the state owned enterprise public bodies are not allowed to settle their dispute through arbitration. This is one of the main limitations which distance the public bodies from resolving their dispute using arbitration.

2.3. The on-site dispute avoidance and resolution mechanisms in the construction sector.

Now a day's dispute resolution in construction sector has focused in avoidance and management of claims before it escalate in to arbitration and litigation. Accordingly, in most circumstance parties involved in the sector prefer to reach at consensus on allegations or claims raised by the other party before the issue becomes dead lock. Due to this in addition to negotiation, various on-site dispute avoidance and resolution mechanisms are used to

solve disputes arising between construction sector actors while the work is on progress. These mechanisms mainly includes:-

- Dispute Resolution Advisor or Dispute review Board (DRB), and
- Dispute Adjudication Board (DAB).

The basic feature of those specific on site dispute avoidance and resolution mechanisms which are highly preferable in recent times are discussed as follows:

I. Dispute Review Board (DRB)

This is also a newly emerged a real-time dispute resolution mechanism used in the construction industry during the progress of construction projects.[88] DRB will be established at the beginning of projects by full agreement of the parties and before any conflict arises.[89] Its purpose is minimizing and avoiding the issues which may likely give rise to disputes if left unattended.[90] Members of DRB are usually chosen jointly by the contractor and the owner prior to the commencement of a project.[91] Members of DRB are always acquitted with situation with both parties and the project right from the beginning and this gives them the opportunity of resolving disputes on the spot.[92]It usually consists of a three-member panel.[93] Their recommendations serve as reinforcement with a positive impact on projects outcome. This is because board members are mutually selected by all the stakeholders of the industry and composed of people that have expertise technical know-how in the area of construction.[94]

Dispute review board mechanism has been proven to be highly effective and reliable in the management of disputes in a number of construction works in countries like China, Lesotho, Hong Kong, U.S.A. and London.[95]For instance, it had been used to resolve disputes in the construction projects like the US Eisenhower channel tunnel, the Hong Kong Airports and many World Bank financed contracts.[96] In the UK, the DRB process was adapted for the

[88]Elsin Tas and Ozge Frtina, "The use of dispute review boards in construction projects: A comparison of Turkey, UK and US", ITU A|Z, Vol 12, No 2, July 2015, p. 191
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] Ibid.
[95]Cyril Chern, Dispute Boards Practice and Procedure, Blackwell publishing, First edition, 2008, pp. 8-9.
[96]Id, p. 14

London 2012 Olympic project.[97] The fact that professionals and experts serve on the board has positive impact on the work progress and there will be a high quality delivery of projects at the end of the day.[98]

II. Dispute Adjudication Board (DAB)

This is also a recently emerged effective mechanism in use to avoid and resolve disputes on major infrastructure projects.[99]Dispute Adjudication Board (DAB) comprises a board of one or three persons, independent of the contracting parties, engaged to perform an overview role of the execution of the project and the contract.[100] Its primary function is to assist the parties to avoid disputes if possible or if not, to assist them to a speedy, cost-effective and acceptable resolution of disputes, and avoid the need for arbitration or litigation.[101]

The DAB will be established as three independent experts appointed by the owner and the contractor from the commencement of a project to solve problems that arise during construction period.[102]The board is constituted to minimize and prevent dispute while work is progressing on site. [103] Parties to construction contract are required to appoint a DAB within 28 days of the commencement date of the contract.[104] This board usually consist of three members, each party nominate a member for the approval of the other and the parties then consult with their nominated members before agreeing a third member to act as the chairman.[105] It is a tripartite agreement involving the employer, contractor and members of DAB. After the commencement of the project, the board meets regularly and periodically visits the site and receives project information to ensure familiarity with the project and the parties. The board arranges a timetable for receiving submissions, reviewing the documents, visiting the site, and conducting the hearing to issue decisions.[106] They also meet regularly

[97] Vincent Leloup, Standing Dispute Boards from the England and Wales perspective, should they be adopted in England and Wales on major projects? And if so, would this require amending the legislation currently in force? 2016, p. 6.
[98]ElsinTas and Ozge Frtina, supra note 88. P. 191.
[99] Nicholas Gould, dispute Boards, www.surco.uk.com, p. 32.
[100] Donald Charrett (Dr), Dispute Boards and Construction contracts, The Victorian Bar, Continuing Professional Development Program, October 20, 2009, p. 2.
[101] Ibid.
[102] Ibid.
[103] Ibid.
[104] The Dispute Board Federation, the use of dispute board in public private partnership, 2013, p. 16.
[105] Cyril Chern, "dispute board practice and procedure", Informa law, Third Edition, 2015, p. 14.
[106] Id, p.4.

to discuss project and dispute. When dispute arises, the board swings into action, hears presentations from the parties, immediately evaluates the dispute and makes settlement recommendations to the parties. DAB decision is binding and parties are required to respect and give immediate effect to it. If either member of the party is not satisfied, such member has 28days within which to issue a notice of dissatisfaction. This board has been found to be more relevant in matters of disputes settlement before they escalate to major disputes between parties.

Although Dispute review board and dispute adjudication board shares a lot of common features, they have some differences. Some of their basic similarities and differences are the following:-[107]

- DRB is required to give decision in between 90 to 180 days whereas DAB gives its decision relatively within a short period of time, which is 84 days.
- DRB gives non –binding recommendations but the decision given by DAB is binding.
- Furthermore, DRB doesn't require the involvement of lawyers whereas; in case of DAB parties may include lawyers in the adjudication process.
- DRB appointment is usually conducted at the beginning of the project where asDABs appointment can be made either at the start of the project (for full term), while others are appointed only for particular disputes (in ad hoc base).
- The DRB mainly aimed in giving nonbinding, very informal "advisory opinions" on issues that have not become formal claims under the contract where as in case of DAB their responsibility goes beyond avoidance of dispute and delivering advisory opinion to that of adjudicating claims and giving binding judgments. The parties are required to respect and implement the decision given by DAB. If, either of the parties is dissatisfied by the decision of DAB, they are expected to follow and appeal to the next step of dispute resolution mechanism set in their contract. The DAB hearing is less formal than an arbitration or court proceeding. However, parties may attend the hearing using lawyers as their representative basing on their choice.

[107] Kurt Dettman and Christopher Miers, "Dispute Review Boards and Dispute Adjudication Boards: Comparison and Commentary", Dispute Resolution Board Foundation, February 2012, pp, 1-4.

Therefore, in practice DRB mainly aimed to resolve disputes before they become claims. Whereas, in case of DAB parties difference can be solved after it has reached to the level of dispute.[108]

2.4. Basic Features of Construction dispute Arbitration.

Construction sector transactions have peculiar features than other sectors of commercial business.[109] The dispute of the sector has also some unique features than other forms of commercial businesses.[110] The study conducted by Queen Marry University of London summarized the basic features of construction dispute as technically complex, containing bulky documents, having large sum of money, involving various claims and multiple parties.[111] Due to this it is recommended as the unique features of construction disputes requires a special approach and procedure to effectively resolve them.[112]

Construction dispute arbitration also requires the rapid resolution of certain time-sensitive issues, which are sometimes vital for the success of a project. Construction dispute arbitration also requires arbitrators to give interim or protective measures prior to the constitution of an arbitral tribunal.

Another important feature of construction dispute is the widespread use of standard forms, such as the FIDIC or the ICE conditions of construction contracts.[113]Therefore, the Efficient dispute resolution requires familiarity and understanding of the, often nuanced, risk allocation arrangements in these standard forms.[114] Good knowledge of construction-specific legislation is also important.[115]

2.5. International Arbitration of Construction Disputes

As construction industry businesses which are financed, developed, supplied and constructed by companies from different nationalities have become more frequent, the need

[108] Ibid.
[109] A. Holt Gwyn, "Arbitration of Construction Disputes", College of Commercial Arbitrators, 2017, p. 1.
[110] Ibid.
[111] Queen Mary University of London and Pinsent Masons, International Arbitration survey-driving efficiency in international construction disputes, how can international construction disputes be resolved more efficiently whilst maintaining fairness and access to justice? November 2019, P. 5.
[112] Ibid.
[113]Starvos Brekoulakis and David Brynmor Thomas, The Guide to Construction Arbitration, Global Arbitration Review , p. 2.
[114] Ibid.
[115] Ibid.

for a dispute resolution method as an alternative to litigation before foreign courts has correspondingly increased.[116]Furthermore, the peculiar feature of construction dispute discussed in this study has made arbitration more preferable than litigation. In practice international companies involved in construction and engineering works prefer to resolve their dispute through arbitration, as opposed to subjecting themselves to the local court systems having their own feature and inherent risks.[117]As a result, construction and engineering projects consistently generate the largest percentage of commercial disputes before international arbitral bodies than any other sector businesses.[118]For instance, in 2015, the construction disputes handled by International Chamber of Commerce amounts 25 per cent of all cases.[119]Therefore, international commercial arbitration has been emerging as the most viable and widely used alternative dispute resolution than court litigation in foreign courts.[120] Recently conducted multinational study by Queen Marry University of London also depicts as international arbitration is the preferred method of dispute resolution for the construction disputes having international nature.[121]

International conventions such as the model law on international arbitration enacted by UNICTRAL, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards as well as Convention on the Settlement of Investment Disputes between States and nationals of other states highly facilitated the efficiency of international commercial arbitration. A number of regional multilateral conventions[122] and bilateral treaties also played a great role in the enforcement of arbitration awards outside the issuing country more than a foreign court judgment.

The availability of international arbitration institutions in different part of the world has also taken the leading role for the growth of international commercial arbitration practice. Such arbitral institutions which are available in different parts of the world have provided a wider option for business entities and persons to select institutions that can best suit to their needs.

[116]David Kiefer and Adrian Cole, supra note 14, p. 81.
[117]Ibid.
[118]Michael J. Elliott, supra note 28, p. 31.
[119] David Kiefer and Adrian Cole, Supra Note 14, p. 81.
[120] Id, p. 86.
[121]Queen Mary University of London and Pinsent Masons, Supra note 44, p 5.
[122]Regional multilateral treaties such as inter-American Convention on International Commercial Arbitration, European Convention on International Commercial Arbitration(1961, Geneva) and European Convention Providing a Uniform Law on Arbitration (1966) are some of the notable regional multilateral treaties which have immense contribution for the development of international arbitration.

According to the Queen Merry University of London (QMUL) Survey, the International Court of Arbitration of the International Chamber of Commerce ("ICC Court"), the London Court of International Arbitration ("LCIA"), the Hong Kong International Arbitration Centre (HKIAC), the Singapore international arbitration centre (SIAC) and the Arbitration Institute of the Stockholm Chambers of Commerce ("SCC") are the most preferred arbitral institutions of the globe.[123]

[123]Queen Mary University of London School of International Arbitration and White & Case, 2018 international arbitration survey: the evolution of international arbitration , page, 2.

Chapter Three

3. The legal Framework and Practice of Institutional Arbitration in Ethiopia: Focus on Construction Dispute Resolution.

3.1. The legal framework of Institutional arbitration in Ethiopia

The main legal sources for any kind of arbitration in Ethiopia are the 1960 Ethiopian Civil Code and the 1965 Ethiopian Civil Procedure Code. The Ethiopian Civil Code starting from article 3325 up to 3346 regulates the substantive issues of arbitration whereas, article 315-319 and those provisions commencing from 350 up to 357 of the Civil Procedure Code mainly regulate the procedural aspects of arbitration. The Ethiopian arbitration law doesn't differentiate between institutional arbitration and ad-hoc arbitration. The arbitration law of the state is equally applicable to both institutional and ad-hoc arbitration. The law also applies to all kinds of arbitration cases whether it is construction, family matter, labor issues, trade or other commercial activities. In addition to the above-stated rules of law, there are few provisions in some parts of the law which suggest the resolution of certain disputes through arbitration. For instance, the following provisions of Ethiopian laws prefer the resolution of disputes through arbitration:-

- The Civil Code in its article 1275 suggests the joint owners to use arbitration as a means of dispute resolution in their dealing as well as to settle dispute arising from the act creating their joint ownership.
- The new labour proclamation No 1156 /2019 under its article 144(1) gives the discretion for employees and employers to settle their disputes either through arbitration or conciliation based on appropriate laws.
- "The cooperatives society proclamation No. 985/2016 under its article 64 require the compulsory submission of certain enumerated disputes to arbitration."
- "During the dissolution of partnership and Share Company, the Commercial Code under its article 267(2) entitles liquidators to refer the matters or issues which need a resolution to arbitration or compromise."
- Article 1038 of the Commercial Code also authorizes a trustee to compromise and arbitrate in respect of any claim concerning the bankrupt's estate after, of course, hearing the opinion of the creditors' committee and the bankrupt, but the bankrupt may make an application to a court to set aside the compromise or arbitration.

So, except for the 1960s few initiations of the legislature to regulate arbitration substantively and procedurally, we can say that arbitration a subject which is not comprehensively regulated in the country. However, there is recently prepared and publicly announced ongoing draft arbitration law which is not yet finalized and enacted. So, the draft arbitration law has been in progress for ratification by receiving comments and suggestions from professionals, practitioners and the wider public.

The country has also signed major international conventions on arbitration such as the UNICTRAL rules and international convention on settlement of investment disputes.[124]However, except the recent ratification of the New York Convention[125]those international instruments have not yet been ratified and become part of the law of the country as the constitution provides under article 9(4).[126]

The supreme law of the country which is the FDRE constitution in its clause 37 puts as "everyone has the right to bring a justiciable matter and to obtain a decision or judgment by, a court of law or any other competent body with judicial power". Though this provision mainly underlines the right to have access to justice, it also reflects as there will be an organ outside the court system which will have judicial power to serve justice by rendering a decision on justiciable matters. These organs which have judicial power outside the court can be administrative agencies or arbitral institutions. Specifically, article 34(5) of the FDRE Constitution clearly stipulates that personal and family matters are subject to arbitration based on religious and customary laws with the consent of the parties at dispute. Without further regulating the situation in which personal and family matters will be arbitrated basing on religious and customary laws, the Constitution left the detail matters to be determined by law. But the legislature has not yet enacted the law regulating the detail matters in which personal and family matters will be adjudicated by arbitration basing on religious and customary laws. The legislature could have enacted relevant laws to fill the existing legal gaps that hampered the efficiency of arbitration. The existing arbitration laws are not comprehensive to govern various

[124]Haile Gebriel G Feyissa, supra note 37, p. 302.

[125]On its session held on 13th of February 2020, the Ethiopian House of Peoples' Representatives has ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and published on the Negarit Gazette as Proclamation No. 1184/2020 on 13th of March 2020.Ethiopia has become the 165th State party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, having deposited its instrument of accession on 24 August 2020.

[126] The 1995 FDRE constitution under article 9(4) puts as all international agreements ratified by the country as an integral part of the law of the land.

modern and complex commercial arbitrations. In addition, Ethiopia has not yet followed the path taken by many African countries in enacting its arbitration laws based on model international arbitration rule which is the UNICTRAL rules. Furthermore, the country has not yet ratified international conventions like the international convention on the settlement of investment disputes and the UNICTRAL rules. These all combined facts will raise question on the way the country is administering and regulating arbitration in this globalized era in which international trade and foreign investment have been the norm.

Generally, in Ethiopia commercial institutional Arbitration including construction dispute arbitration has not been critically considered and seen as justice serving institution alternative to the court. Still, courts are considered by far as the main justice serving organ of the nation. The country lacks supportive national policies, national laws and ratified international legislation until to the recent ratification of the New York Convention for the establishment and operation of strong institutional arbitration.

3.1.1. The agreement to Arbitration

The basis for all kinds of arbitration is a contractual agreement. Arbitrators acquire their jurisdiction from the will of the parties or agreement. The parties' interest can be reflected in the arbitration agreement either in the form of a separate agreement to submit an existing dispute to arbitrators or in the form of an arbitration clause within the main contract establishing right and responsibilities b/n them. Arbitration agreements are usually made in writing. Existing Ethiopian Law doesn't require all arbitration agreements to be made in writing. The Civil Code under article 3326(2) provides that "the arbitral submission shall be drawn up in the form required by law for disposing of without consideration of the right to which it relates." But the draft arbitration law under article 5 makes arbitral agreements to be made necessarily in writing. In general without arbitration agreement, there would be no arbitration, except in situations where national laws prescribe mandatory arbitration.

The Ethiopian Civil Code requires parties to enter into arbitration agreement either in the form of an arbitration submission or arbitration clause. Parties may also express their agreement to solve a future dispute arising from their contract through arbitration.[127]Arbitration agreements usually deal with a range of issues including types of arbitration, the seat of arbitration, choice of law,

[127] Civil Code of the Empire of Ethiopia, Negarit Gazette, Proclamation No 165 of 1960, Addis Ababa, 1960, Article 3328(2).

the composition of the arbitral tribunal, the language of the arbitration, scope of the arbitration agreement, and the like. Compliance with the statutory requirements is crucial for the validity of the arbitration agreement. Ethiopian law requires the fulfillment of certain substantive and formal requirements. The general substantive requirements relating to consent, capacity, and offer and acceptance are obviously relevant to arbitration agreements.[128] Apart from these substantive requirements, the test of "arbitrability" and the "capacity to arbitrate" need to be satisfied.[129]In this regard the draft arbitration law under article 6 enumerates specific matters which are not subject to arbitration.

3.1.2. The law and the practice of establishing arbitral Tribunal in Ethiopia.

Establishing Arbitration Tribunal usually requires the initiation of the parties. The parties may present their dispute by applying to organ which is contractually entrusted to arbitrate disagreement. In other case, when one of the parties desire to resolve disputes as per existing contract which leads to institutional arbitration, he/she will file an application requesting arbitration. As per the civil code, parties are normally free in appointing their arbitrators provided that each party is treated equally.[130]Parties can appoint arbitrators in their arbitration agreement, either by specifying the names of arbitrators or by specifying the procedure of appointing arbitrators without necessarily mentioning the name of arbitrators.[131] They can also refer the appointment of arbitrators to other arbitral codes or arbitration rules of institution.[132] The number of arbitrator to be appointed by the parties needs to be equal.[133] Article 3335 of the civil code provides as the arbitral submission will not be valid if it places one of the parties in privileged position regarding the appointment of the arbitrator. This reflects as the Ethiopian law recognizes the principle of equal treatment or natural justice as undeniable public policy. However, in practice establishing arbitration tribunal is not smooth in all cases. In case when either of the parties is reluctant to nominate arbitrator, the appointment will be made either by third person who is contractually entitled to do so or by court.[134]Therefore, the establishment of

[128] Id, Article.1678.

[129] The 1965 Civil Procedure Code of Ethiopia under article 315(2) provides as administrative contract which are defined under article 3132 of the Civil Code are non-arbitrable.

[130] Civil Code of the Empire of Ethiopia, supra note 127, Art 3331 and 3335.

[131]Id, Article 3331(3).

[132] Id, Article 3331(1).

[133] Id, Article 3335.

[134] Id, Article 3334. The article provides that in case the other party or the person required to appoint an arbitrator fails to do so within thirty days, the court shall appoint such arbitrator.

the arbitral tribunal is dependent on the appointment of arbitrators as per the arbitral agreement, arbitral institution rules or relevant laws. Section three articles 10 and 11 of the draft arbitration law have almost similar rules on the appointment of arbitrators and establishing arbitral tribunal.

3.1.3. The law of arbitration proceeding in Ethiopia.

The arbitration tribunal has a wide array of decision making power basing on the relevant and applicable laws of the country as well as relying on agreement of the parties at dispute. The Ethiopian civil procedure code beginning from article 315 to 319 and article 350- 357deals with the way arbitration tribunal proceeding is conducted. The civil procedure code under its article 317(1) stipulates that regardless of the subject matter of the arbitration all arbitration tribunal has to follow a procedure which is as near as the same with that of the civil court. Article 3345 of the civil code also outline that the procedure to be followed by the arbitration tribunal shall be as prescribed by the civil procedure code including the execution and appeal of the award.[135]

The civil procedure code of Ethiopia also provides that the arbitral tribunal shall in particular hear the parties and their evidence respectively and decide according to law unless by the submission it has been exempted from doing so.[136] Here the law permits for parties to agree in the arbitral submission or clause to authorize the arbitral tribunal to give judgment without hearing and examining evidences but just simply basing on basic principles of laws. This is important mainly when the dispute of the parties is purely legal dispute. However, in the absence of the agreement the tribunal is required to hear and examine evidences and give decision in accordance with law. Once the arbitral tribunal is established, the arbitration will proceed by summoning the other party to present his statement of defense and counter claim if any, as well as to participate in the whole proceeding of the arbitral tribunal.[137] When a party, who has been given the opportunity to be heard and produce his evidence, fails to do so, the tribunal has the power to give its award in default.[138] The law provides the whole procedures of resolving disputes by arbitration to be made consistently with the principle of laws.[139]Therefore, keeping the various nature of arbitration such as its flexibility and confidentiality, the basic principles of law applicable in court proceeding for adjudication of civil suits will be applicable.

---

[135] The 1960 Ethiopian Civil Code, supra note 127, Art. 3345.
[136] Civil Procedure Code of the Empire of Ethiopia, Negarit Gazette, extraordinary issue No.3 of 1965, Art. 317 (2).
[137] Id, Article 317(3).
[138] Id, Article 317(4)
[139] The 1960 Ethiopian Civil code, supra note 127, article 3325(1).

In its initial stages the tribunal may commence its activities by making prima facia scrutiny in order to decide as whether it has legal power to adjudicate on the validity and existence of arbitral submission b/n parties to resolve their dispute by arbitration. This doctrine is known worldwide as the principle of competence-competence. The doctrine of competence-competence will be an issue when objection arises on the very existence and validity of arbitral submission or clause. In some jurisdiction the power to decide on jurisdiction of arbitral tribunal is given to courts but there are countries which gives such power for the tribunal itself.

The 1960 civil code of Ethiopia under its article 3330(1) provides the possibility of authorizing arbitrators by arbitral submission to decide on difficulties arising out of the interpretation of the power of arbitration submission itself. But the scope of such authorization doesn't goes to the extent of deciding the validity and existence of arbitral submission.[140] It seems that article 3330 of the civil code provides a right for the parties to authorize arbitrators only to interpret difficulties related to the scopes covered by arbitral submission for arbitral adjudication without granting power to adjudicate the validity and existence of the arbitral submission. So, if arbitration panel in Ethiopia faces objection on ground of validity and existence of arbitration agreement, they are expected not to deal with the issue rather to refer the matter to courts. Therefore, in the case of our country, the jurisdiction to decide on the existence and validity of the arbitration clause or submission is explicitly given to courts. But all other jurisdictional challenges arising from the arbitral submission other than the validity and existence of the arbitration agreement are given to arbitral tribunal to rule on them.[141]Differently the draft Arbitration law recognizes the power of arbitral tribunal to decide on the existence and validity of arbitral submission.[142] This is one of the remarkable achievements incorporated by the draft law.

The non recognition of the competence-competence principle by the existing Ethiopian arbitration laws has its own drawbacks in the efficiency of arbitration. It affects the very purpose of the parties' preference to arbitration which is settling disputes outside national courts that are time taking, costly, rigid and unpredictable. In particular for disputes like construction disputes which require immediate resolution, the recognition of competence principle has paramount significance. In countries where their overall legal system is considered as pro arbitration or

[140] Id, Article 3330(3). This article stipulates as the arbitrators in no case will be required to decide on the validity of arbitral submission.

[141] The 1960 Ethiopian Civil Code, supra note 127, Article 3329 and 3330(2).

[142] Article 18(1) of the draft arbitration law of Ethiopia.

modeled on UNICTRAL arbitration rules,[143] the arbitral tribunal has full jurisdiction to decide on the validity and existence of the arbitral submission. The international practice also shows that the arbitration tribunals' power to decide on their own jurisdiction has been serving as a pillar for their efficiency.[144] In general it protects arbitration from early unwarranted court intervention.

3.1.4. The legal space for the interface of institutional arbitration and courts in Ethiopia

Once the arbitral proceeding is in progress, the arbitration tribunal will resolve disputes with the necessary help and support of courts. The relevant involvement of courts in arbitration proceeding is widely practiced in countries which have arbitration friendly jurisprudence and leading international arbitration institutions. In Ethiopia too, there are a lot of circumstances where court interact with arbitral tribunal at each stages of arbitration proceeding. These circumstances are prescribed in both Civil Code and Civil Procedure Code of the country. The two arbitration institutions of the country namely, the Addis Ababa and Ethiopia Chamber of Commerce arbitration rules have also incorporated various rules which seek court support for the efficient resolution of disputes. However, there is no separate specific arbitration rule in the country governing the arbitration of construction disputes. The studies of scholars in different jurisdiction categorize the interface of courts and arbitration in to two circumstances. The first category is the situation where national courts intervene in arbitration proceeding beyond the required level affecting the very purpose of arbitration. This kind of unwarranted court intervention will lead the arbitration to lose its purpose. Under the second category, the court intervention is considered as very essential and supportive for the effectiveness of arbitration. This kind of court intervention is considered as minimal and mainly based on the request of the party and arbitral tribunal. So, like any other country, Ethiopian courts have their own legal space of ruling at various stages of arbitration. It is unthinkable to see an efficient arbitration system without the necessary support and supervision of courts. In Ethiopia the intervention of the court in arbitration proceeding will likely arise at the early stage when one of the parties at dispute opposes the validity and existence of arbitration agreement. `The civil code under article 3330 explicitly forbids the arbitral tribunal from giving judgment in case parties are at

[143]The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, as Revised in 2006, Article 16(1), provides 'the tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.' So, in countries that follow the UNCITRAL Model Law arbitrators have power to rule on the existence and validity of arbitral agreement.

[144]Hailegabriel G. Feyissa, Supra note 37, p.299.

disagreement on the validity and existence of arbitration agreement. In such instances one of the parties may apply to court seeking its ruling. Such early intervention of courts in arbitration will take away the proceeding in to court litigation. Once the issue is filed to regular courts, there is a high probability in which the parties may pass through all levels of the judiciary until final judgment is given through exhaustion. The AACCSA –AI arbitration rules and ECCSA-AI arbitration rules to some extent deviate with the above civil code provisions which absolutely restrict the arbitral tribunal from deciding on the issues of validity and existence of arbitration agreement. Both rules of the arbitral institutions give the power of to rule on the validity and existence of arbitral agreement for the arbitral tribunal. The step taken by the institutions in this regard is essential for the efficacy of the arbitration proceeding. However, in case one of the parties refuses the power of the arbitral tribunal to decide on the existence and validity of arbitral submission, the competent jurisdiction will be only the court and the arbitral institutions rule will lack legal effect in such instances.

Secondly, establishing the arbitral tribunal may also require the support of courts. When one of the parties is reluctant to appoint an arbitrator within the time set for appointing arbitrator by agreement and law, the other party may request the court for the appointment of arbitrator.[145] In such cases the court can gives ruling for the appointment of arbitrator basing on the agreement of parties.

Once the arbitration tribunal is established, the whole proceeding of the arbitration is expected to follow as much as possible that of the civil procedure law.[146]It is required to follow basic principles of due process of law or ensure procedural fairness. Appointed arbitrators are required to be independent and impartial. However, when the parties have doubt on the impartiality and independence of arbitrators, there are legal grounds in which parties may apply for the disqualification. Some of the grounds in which parties apply for disqualification of arbitrators is:-

- When there is doubt on the impartiality or independence of the arbitrator;
- When the arbitrator is not of age, sound mind or health;
- When the arbitrator is unable to discharge his/her functions properly and within reasonable time and when he/she is absent or convicted of criminal offense.[147]

[145] The 1960 Ethiopian Civil Code, supra note 127, Art. 3334

[146] Id, Article 3345. It provides as the procedure to be followed by the arbitration tribunal shall be as prescribed by the Code of Civil Procedure.

[147] Id, Article 3340.

The application for disqualification shall be made to the arbitration tribunal by a party before the giving of the award and as soon as such party new of the grounds for disqualification.[148] But if the application is dismissed by the arbitral tribunal, the decision will be appealed to regular courts within ten days.[149] Almost similar reasons for the disqualification of arbitrator are stated in the top international arbitration institution rules such as American arbitration Association rule clause 20, UNICTRAL clause 12, LCIA rule 10, ICC article 14 and HIAC article 11.Furthermore, the court also involve in arbitration cases when the parties seek setting aside, appeal, recognition and enforcement of the award as provided by the law.[150]However, the draft arbitration law has an intention to limit the involvement of court in arbitration. The draft proclamation gives parties the right to waive appeal and review of cassation bench by their arbitral submission.[151] The draft arbitration law also grants the arbitral tribunal with power to rule on the existence and validity of arbitral agreement.[152]

3.1.5. The rules and practices of setting aside and appeal of arbitral award in Ethiopia.

Under Ethiopian civil procedure code of article 318(2), an arbitral award is required to be made "in the same form as a judgment." That means like a court judgment an arbitral award must be made in writing and signed by the arbitrators. It must also contain the points for determination, the decisions and the reasons for such decisions and where it has been rendered by a majority decision, the dissenting arbitrator must also state in writing the decision which it thinks should be made together with the reasons thereof.[153] After fulfilling all the requirements of the law and upon the application of the successful party for the homologation of the award and its execution, the arbitral award can be executed in the same form as an ordinary judgment.[154]

Concerning setting aside of decision, the law allow the parties to apply to courts for setting aside the award basing on certain enumerated circumstances. Accordingly, an arbitral award may be set aside in the following grounds:-

[148] Id, Article 3342(2)
[149] Id, Article 3342(3)
[150] The Civil Procedure Code of Ethiopia commencing from article 351 -357 and from article 456-461 deals with the legal grounds of setting aside an award, appeal as well as recognition and enforcement of award.
[151] Article 48 of the draft Ethiopian arbitration proclamation.
[152] Article 18 of the draft Ethiopian arbitration proclamation.
[153] The 1960 Ethiopian Civil Code, supra note 127, Article 181 (1) and (2) .
[154] Civil Procedure Code of the Empire of Ethiopia, supra note 136, Article319 (2).

- When the arbitrator decided matters not referred to him or made his award pursuant to a submission which was invalid or had lapsed and
- When the arbitrators, being two or more, did not act together; or the arbitrator delegated any part of his authority to a stranger, to one of the parties, or to a co-arbitrator.[155]

Up on these grounds, application to set aside awards can be made to a court within 30 days from the date of making of the award.[156]

Parties in arbitration have also a right to appeal from the awards of arbitrators to ordinary court for any of the grounds laid down under article 351 of the civil procedure code. However, the award may be remitted for the reconsideration to the arbitrator who made it only for a case where "the award is inconsistent, uncertain or ambiguous or is on its face wrong in matter of law or fact;" or "where the arbitrator omitted to decide matters referred to them". In case of remission of an award, unless otherwise directed in the order or remission, the arbitrator will be required to make his second award within three months.[157]But parties can waive their right of appeal, provided that they are with full knowledge of the circumstances.[158]

The Ethiopian civil procedure code under its article 350(2) gives a right for the parties to waive their right of appeal as long as it is done with full knowledge of circumstances. But as per article 80(3) (a) of the FDRE constitution, the waiver of the appeal right doesn't preclude the Supreme Court to review the award in its cassation power in case the award contains fundamental error of law. But as per the rules of international arbitration institutions, international arbitration conventions and model rules the parties have full right to waive appeal right in their arbitration agreement.[159]The prevailing thought in the area of international arbitration bases on the fact that the parties' choice to make the award final and binding is seen as one of the objective of the parties' preference of arbitration by negating the court litigation process.[160] The draft arbitration law has some different stand on appeal. As per the ongoing draft arbitration law, the decision of the tribunal will be final unless the

[155] Civil Procedure Code of the Empire of Ethiopia, supra note 136, Article 356.
[156] Id, Article 355(2).
[157] Id, Article 354(2).
[158] Id, Article 350 (2).
[159]Seid Demeke Mekonnen, "Court Review of Arbitral Awards through the Power of Cassation: A Case Comment on National Mineral Corp. Pvt. Ltd. Co. v. Danni Drilling Pvt. Ltd. Co", Mekelle University Law Journal, Vol.3 No. 1 (2015), p. 122.
[160] Id, p. 123.

parties have an agreement to make appeal to the regular courts.[161]Furthermore, the draft law permits parties to agree for waiving the review of the tribunal decision by cassation bench.[162]This is also the other positive steps taken by the draft law.

3.1.6. The rules and practices of recognition and enforcement of the arbitral award in Ethiopia.

As per article 318 of the civil procedure code an award shall be made in the same form as judgment. Article 179-184 of the civil procedure code deals with form, content and pronouncement of court judgment and decree. The civil procedure requires judgments to be made in writing & signed by the members of the court and pronounced by the judge or presiding judge. Where a case has been heard by more than one judge, the decision of the majority shall be the judgment of the court, provided that any judge dissenting from the decision of the majority shall state in writing the decision which he thinks should be made together with the reasons thereof.[163] Therefore, the arbitral panel is empowered to give binding judgment almost in similar manner as the civil court gives judgment. The arbitration panel can also gives a judgment concerning any damages that are a consequence of the issues being decided.[164]

In March 2020, Ethiopia has ratified the 1958 New York Convention on the recognition and enforcement of arbitral award. As per article 9(4) of FDRE Constitution international treaties ratified by the country shall immediately be part of the law of the land. The ratification of the most effective and worldwide recognized New York convention on the recognition and enforcement of arbitral award gives an ample opportunity for enforcing arbitral award of international commercial disputes settled by arbitration outside Ethiopia.

The New York Convention provides the structure to enforce awards. The scope of the treaty is limited to foreign (international) commercial agreements of arbitration. However, Ethiopia has made reservation to the New York convention by limiting the applicability of the convention only to those commercial Arbitration Agreements concluded and Arbitral Awards rendered after the date of its accession to the Convention. Furthermore Ethiopia has also limited the applicability of the convention only to contracting states of the convention.

[161] Article 48 of the draft Arbitration Law of Ethiopia.
[162] Ibid.
[163] The 1960 Ethiopian Civil Code, supra note 127, Article 318 and 181(2).
[164] Id, Article 318(2).

The draft arbitration proclamation also recognizes the enforcement of foreign arbitral awards based on the international treaties ratified by the country.[165] Furthermore specific reasons which hinder the enforcement of foreign arbitral awards are stated under article 52(2) of the draft proclamation. Almost similar reasons with existing laws such as the issue of reciprocity, points that are related with equal treatment of parties, public policy, morality and legality issues are stated as measurement criteria for enforcing foreign arbitral awards.[166]

3.2. The practice of Institutional arbitration in Ethiopia in resolving construction disputes.

Even though, the Ethiopian society has a long history of adjudicating disputes through cultural and religious arbitration which is known as "Shimgilina",[167] institutional arbitration is a recent phenomena having an age of not more than two decades.[168] The dispute resolution mechanism of "Shimgilina"in Ethiopia seems to have a broader concept than the modern perception of arbitration. Shimgilina uses a combination of different ADR mechanisms including mediation, conciliation, compromise and arbitration for settling disputes.[169]Even now a day's Shimgilina is the widely used method of traditional dispute resolution in many parts of the country.[170]

The modern commercial arbitrations regulated by law are introduced during the 1960's era of codification. The 1960 Civil Code and the 1965 Civil Procedure Code of the country has been the sole source of modern arbitration. After the enactment of these codes the practice of arbitration has been implemented in different family and personal disputes. Until the establishment of the first institutional arbitration, which is Addis Ababa Chamber of Commerce and Sectoral Association Arbitration Institute in 2002, modern arbitrations were solely practiced on ad-hoc bases.

The beginning of institutional arbitration is mainly linked with the establishment of arbitration institute within the organization of Addis Ababa Chamber of Commerce and

[165] Article 52 of the draft arbitration proclamation of Ethiopia.
[166] Article 52(2) of the draft Arbitration proclamation.
[167]"Shimgilina"is a traditional method or process of handling and settling disputes usually carried out by certain elected elders of the society.
[168] Addis Ababa Chamber of Commerce Arbitral Institute, which was established in 2002 is the first commercial arbitral institution established in the country.
[169]Hailegabriel G. Feyissa, supra note 37, p. 301.
[170] Ibid.

Sectoral Association (here in after will be described as AACCSA-AI).[171]However, the establishment of the chamber is older than the birth of the arbitration institute. The chamber was established in 1947 during the era of Emperor Haile Selasie mainly to enhance and support trade, industry and investment within the country.[172]

After the establishment of the arbitral institute, the chamber has been serving as one of the main centre of modern commercial arbitration in the country. AACCSA-AI has the objective of facilitating and administering the settlement of commercial disputes basing on arbitral rules of the institute. Following the establishment of AACCSA-AI, Ethiopian Arbitration and Conciliation Center (EACC) was established by a group of Ethiopian lawyers in March 2004 with the aim of providing an alternative mechanism for private dispute resolution.[173] It has offered some arbitration and mediation services on commercial, labor, construction and family disputes.[174] Unfortunately, this centre is not operational right now and it has only survived few years. Later the EACC has changed its legal status in to civic organization and come back with the name known as Ethiopian Centre for Development.[175]The main reason for the closure of EACC as the authorities of Ministry of justice informed EACC was the absence of law that enables them to have the appropriate license for their establishment and subsequent operation.[176]The enactment of the then time new Civic Societies proclamation was also mentioned as the main source of controversy that lead to the closure of EACC.[177]After that, Bahir Dar University Law School has also taken the courage and established an arbitration centre with primary objective of resolving business transaction disputes in a quick way, inexpensively and with certainty.[178]The center has not yet arbitrated and awarded a single arbitration case except the activities made on the awareness creation of ADR mechanisms.

[171] Addis Ababa Chamber of Commerce internet website available at https://addischamber.com/arbitration/
[172] Ibid.
[173]Interview conducted with Haregeweyin Ashenafi, currently working as Executive Director at Ethiopian Center for Development, the interview is conducted in the office of Ethiopian Center for Development located at Bole Alem Building 6th floor, the interviewee was one among the top managers of EACC, the interview is taken in October 2020.
[174] Ibid.
[175]Interview conducted with Haregeweyin Ashenafi, supra note 173.
[176] Ibid
[177] Ibid.
[178]Available at the website of Bahar Dar University Law School,https://bdu.edu.et/law/?q=content/arbitration-center.

Recently, the Ethiopian Chamber of Commerce and Sectoral Association has also established its own arbitration centre. The Ethiopian Chamber of Commerce has not been serving as an arbitration centre until it establishes its arbitration institution in 2018. Even though, the study has the aim of looking at the legal and practical challenges of institutional construction dispute arbitration across the country, ECCSA-AI has only three currently pending construction dispute cases which are not yet decided.[179]

3.2.1. Construction dispute arbitration practice in Arbitral institutions of Ethiopia; the case of Addis Ababa Chamber of Commerce Arbitral Institute.

As per the revised 2008 rules of AACCSA-AI[180]the main objectives of the arbitration centre are:[181]

- Facilitating and administering the settlement of disputes as per the rules of the institute.
- Providing information and advisory services concerning arbitration and other alternative dispute resolution mechanisms.
- To provide the institute's office to ad-hoc arbitration activities; and
- Organizing workshops, seminars and training concerning arbitration.

The institute is relatively the prominent institutional arbitration centre for the country. Almost more than half of the arbitration cases filed at AACCSA-AI are disputes related with construction works.[182] For instance in 2016 the arbitration centre has received thirty two arbitration cases out of which seventeen of them are disputes connected with construction works.[183] In 2017 the institute received 24 arbitration cases and eleven of them are disputes which are categorized as construction disputes.[184]In 2018, the number of construction disputes filed at the AACCSA-AI has been increased than any other kinds of commercial disputes. Accordingly, thirty one arbitration cases are filed and 25 of them are disputes emanated from construction sector.[185]The 2008 revised arbitration rules of AACCSA-AI

[179] Interview conducted with Selam Setegn, Director of the arbitration institute of Ethiopian Chamber of Commerce and Sectoral Association. The interview is conducted in the office of the arbitral institute director located in front of Federal Police head quarter building, locally known as "Mexico" area

[180] AACCSA-AI refers to Addis Ababa Chamber of Commerce and Sectoral Association Arbitration Institute.

[181]Addis Ababa Chamber of Commerce internet website, available at https://addischamber.com/arbitration

[182] The report taken from the Director of the Arbitral Institute Mr. Yohannes W/Gebreil.

[183] Interview conducted with Yohannes W/Gebreil, Director of the Arbitration Institute of Addis Ababa Chamber of Commerce and Sectoral Association. The interview is conducted in the office of the director located in front of Federal police head quarter building, locally known as "Mexico" area.

[184] Ibid.

[185] Ibid.

apply to all kinds of commercial disputes regardless of their nature. Unlike the American Arbitration Association, ICC and LCIA,[186] arbitration institutions of our country lacks separate arbitration rules for construction disputes that consider its unique features.

The 2008 revised AACCSA-AI rules have six parts and 38 articles. The first part deals with definition and general matters on applicability of the rules. The remaining parts of the AACCSA-AI rules are classified as follows:-

- Articles 6-9 deals with initiation of proceeding.
- Articles 10-16 focuses on composition of arbitral tribunal
- Articles 17-24 deals about the arbitral proceedings
- Articles 25-31 regulates about the arbitral award
- Articles 32-38 deals with cost of arbitration.

I. The legal and practical experiences of initiating institutional arbitration proceeding for construction disputes in Ethiopia.

Construction disputes have their own peculiar features than any other forms of commercial disputes. It involves various parties, huge amount of money and very complicated technical matters which its resolution requires professional and experienced expertise. By their nature construction contract documents are large containing drawings, design and technical terms. Most construction contracts also incorporate alternative dispute resolution mechanisms other than arbitration to be used before disagreement escalate and reach to arbitration stage. If parties at dispute are unable to resolve their disputes through other prescribed ADR mechanisms, one of the parties may request for arbitration provided that they have a contract to arbitrate.

The recently established Ethiopian Chamber of Commerce Arbitration Centre has almost similar arbitration rules with the Addis Ababa Chamber of Commerce Arbitral Institute. In both cases, the institutional rules do not apply automatically; they only apply if the parties incorporate such rules expressly in their arbitration agreements.[187]

The first stage of the arbitral proceeding including that of construction dispute in the two institutional arbitration of the country is making a request of application for arbitration. Up

[186] The American arbitration association has its own construction industry arbitration rules including for large and complex construction disputes.

[187] The revised arbitration rules of Addis Ababa Chamber of Commerce and Sectoral Association Arbitration Centre (December 25, 2008), article 1.

on payment of registration fee and costs necessary for the institute's administrative costs, a party may provide a written request for settling disputes through the institutional arbitration systems provided. A party requesting the settlement of dispute through arbitration may submit all or certain disputes which have arisen between them in respect of defined legal relationship, whether it is contractual or not.[188]

There are challenges faced by arbitral institution and the parties requesting arbitration during the initiation of arbitral proceeding and at the time of establishing arbitral tribunal. The main challenges identified from arbitration files of the arbitration institutions, through interviewing experienced construction dispute arbitrators and federal high court judges of Lideta bench are the following:-

- The refusal of either of parties in respecting their contractual promise to solve their disputes through arbitral tribunal is one of the challenges. In such case the party who initiated the resolution of disputes through arbitration may petition to court to get order of court that compels the other party to submit himself to the arbitration as per the agreed contract. This is not always smooth; sometimes getting the court order may take long time contrary to the purpose of arbitration.[189]However, in practice resolution of construction disputes are considered as time sensitive than most other commercial disputes. The arbitral institutions do not force the parties to respect their contractual commitment of solving disputes by arbitration as agreed. The absence of legal authority which empowers arbitral institution to give order for the parties at dispute to respect their contractual obligation has created a negative effect on the effectiveness of arbitration.[190] The legislative body of the country could have explicitly given such relevant power for arbitral institution to increase the efficiency of arbitration.

[188] The revised arbitration rules of Addis Ababa Chamber of Commerce and Sectoral Association Arbitration Centre (December 25, 2008), article 6. Similar provision is also incorporated under article 5 of the Ethiopian Chamber of Commerce and Sectoral Association Arbitration Centre Arbitration Rules. There are also enumerated requirements in which the applicant requesting arbitration is required to fulfill. See article 7 of AACCSA-AI and article 5 of ECCSA-AI.

[189] Interview conducted with Professor Zekarias Kenea (Addis Ababa University School of Law), Fasil Tadese (legal advocate and experienced construction dispute arbitrator) has also raised as the refusal of one of the parties to appoint arbitrators and failure to discharge other required obligations has been hindering the whole arbitration process.

[190] On the case b/n Daniel Birehane General contractor and Electric Power Corporation the Addis Ababa chamber of commerce arbitration centre has ruled that even though there is agreement between parties, the institution doesn't order or force the parties to appear before the institution for arbitration. This ruling is given by AACCSA-AI at file No □/19/80/2005, on 25/03/2003 E.C

- The failure of parties' to clearly specify the subject matter of their contractual disputes which falls under the scope of arbitration mainly encounter controversy on the power of arbitrators to entertain certain contractual disputes.[191]In practice, ambiguity of arbitral submission or clause raises the issue of whether some disputes are under the jurisdiction of the arbitral panel. A partial challenge to jurisdiction may be brought on the arbitrators' authority to decide a particular claim, counterclaim, or issue, or the arbitrators' authority over a particular party. The AACCSA-AI faces frequent challenges in relation to the scope of power given to the arbitral panel by the arbitration agreement.[192]So, it has been one of the challenges which the arbitration panel administered by arbitration institution is still facing. Such partial challenge to jurisdiction of the arbitral tribunal is common in construction dispute arbitration for the fact it has technically intertwined and complicated matters that involve various actors of the sector. In Ethiopia, the non empowerment of arbitral tribunals in deciding the validity and existence of the arbitral submission pulls the arbitration issues in to the court system at its early stage losing the basic purposes of arbitration. In this regard the conventionally accepted principle in modern international arbitration is that arbitrators have competence to rule on their own jurisdiction.[193] Otherwise, the lack of competence by arbitrators to decide fully on their scope of jurisdiction jeopardizes the effectiveness of the arbitration. There are a lot of practical circumstances where parties have challenged the existence and validity of arbitral agreement.[194] In such case the issue will be forwarded to the court. The practice indicates that most of the time the party opposing the jurisdiction of the arbitral tribunal will not respond to any kind of request for arbitration until the parties receive court order which compel them to respect their contractual promise.[195] In such circumstances the court

[191] The interview made with highly experienced construction dispute arbitrators such as Professor Zekarias Kenea and Fasil Tadesse as well as the federal high court judges of Lideta civil bench (Justice Nuredin Kedir, justice Seble Kinfe, Justice Yakob Mekuriya, Justice Yosef Mohammed, Justice Adem Seid and three other anonymous Justices) shows that as contracting parties have weakness in properly describing the scope of the arbitration in their agreement.

[192] Interview conducted with Yohannes W/Gebreil, supra note 183.

[193] For instance Article 19 (1) of ICDR rules, Article 6(3) and 9 of ICC rules, article 23.1 of LCIA, article 23(1) of UNICTRAL rules, article 28.2 of SIAC rules and article 19.1 of HKIAC rules empowers the arbitral tribunal to rule on the validity and existence of arbitration agreement.

[194] Interview made with highly experienced Arbitrators and Federal high court Judge, supra note 191.

[195]Ibid.

process will take unnecessarily longer time by affecting the very objective of arbitration. The problem is more severe in the case of construction contract disputes. In most cases, disputes in the construction sector require swift resolution for the completion of the project or for the operation of completed projects. Otherwise, construction disputes which can take longer time in their resolution have a severe and wider impact affecting the completion and operation of projects as well as creating social, economic and political problems.

II. The legal and practical experiences of establishing an arbitral tribunal for construction disputes in institutional arbitrations of Ethiopia.

The establishment of arbitral tribunal for all types of commercial disputes primarily depends on the appointment of arbitrators by parties. Ethiopian law allows parties to determine the number of arbitrators.[196] When the parties have not agreed or determined the number of arbitrators in their agreement, the default rule will be either the law of the nation or the rules of the arbitration center to which the parties have agreed to settle their disputes. The Ethiopian Civil Code provides that when the arbitral submission fails to specify the number of arbitrators or the manner in which they shall be appointed, each party shall appoint one arbitrator.[197] Then the two arbitrators together appoint the presiding arbitrator. However, the Code is not clear in the appointment of arbitrators when the case involves multiple parties from both sides of claimant and respondent and parties have not determined in their agreement. But it can be impliedly understood as each of the parties appoints one arbitrator unless the parties have otherwise agreed. The two chambers of commerce arbitration centers rules have provisions regulating the appointment of arbitrators when there are multiple parties from either side of the applicant or respondent. As per article 10.3 of AACCSA-AI rules, when multiple parties have no agreement concerning the appointment of an arbitrator, and the dispute is to be decided by more than one arbitrator, the multiple claimants, jointly, and the multiple respondents, jointly shall nominate an equal number of arbitrators. But if either side fails to make such a joint appointment, the institute shall make the nomination for that side. Further, the provision of AACCSA-AI provides that if the circumstances warrant and there is no otherwise agreement by the parties the arbitral institute may nominate the entire arbitral tribunal. The recently established Ethiopian Chamber of Commerce and

[196]The 1960 Ethiopian Civil Code, supra note 127, article 3331.
[197] Ibid.

Sectoral Association Arbitration Center has also similar rules under its article 14. So, the gap filling provisions of those arbitral institutions are essential when the parties fail to provide for appointment mechanism and the number of arbitrators' .In practice, the problem arises when the parties are unwilling to appoint arbitrators pursuant to their agreement. The unwillingness of the parties to appoint arbitrators unnecessarily drags the issue towards a court process. The request made to courts for arbitrators appointment unduly takes longer time.[198] Particularly, in construction works most disputes are time sensitive which requires immediate resolution. So, delay occurring in construction arbitration results in huge loses and multiple effects in interdependent parties depending on the nature and size of the projects.

According to the arbitration rules of both chambers of commerce, appointed arbitrators are required to be impartial and independent.[199]As per the arbitration rules of AACCSA-AI, before appointment or confirmation, a nominated arbitrator shall sign a statement of acceptance, declaration of independence and undertakes to honor the institute's arbitrator's code of conduct.[200] The institute has been practically implementing a form on which each arbitrator's signs declaring his/her impartiality and independence.[201] But as practice shows there are circumstances in which some arbitrators act as an advocate of the parties who selected them.[202]

In relation to the appointment of the arbitrators, in addition to the existing state laws, there are institutional rules of challenging and replacement of arbitrators. Almost similar rules of challenging, removal and replacement of arbitrators are prescribed in both the Civil Code and institutional rules of the arbitration centers. But the institutional rules of both chambers of commerce empower the institution themselves to challenge arbitrators mainly basing on their impartiality and independence.[203] Both arbitration centers of the country have assumed the responsibility of challenging the partiality and dependence of the arbitrators. This is one of the interesting responsibilities taken by the institution to ensure justice in undeveloped private justice system of the country.

---

[198] Interview made with highly experienced Arbitrators, supra note 186.

[199] AACCSA-AI, Arbitration rules, Art. 12 and 13. ECCSA-AI, arbitration rules have also similar provision under article 11.1.

[200]AACCSA-AI, revised 2008 arbitration rule, Article 13.2.

[201] The practical observation made in AACCSA-AI has shown me documents where the arbitrator judge has signed testifying his impartiality and independence.

[202]Interview made with well known construction dispute arbitrators professor Zekarias Kena and Fasil Tadese.

[203] AACCSA-AI, 2008 revised arbitration rules, Art. 14.3, 15.3 and ECCSA-AI arbitration rule Art. 11.1 and 16.2.

Replacement of an arbitrator may also be made either by the arbitral institute or the parties who appointed the arbitrators. When an arbitrator nominated by the party dies, the party in question shall nominate another arbitrator. Whereas when an arbitrator nominated by the arbitral institute dies, the institute shall appoint another arbitrator.

Unless the parties have agreed otherwise in their arbitral submission, the panel may, immediately after its establishment, order any interim or conservative measures it deems appropriate.[204]Interim measures are critical in most construction disputes in practice and exercised by various prominent international arbitration institutions.[205] The measures such as, preservation of property or rights might have a project life saving effect whereas, those such as attachment orders or injunctions, partial payment of a claim or security for costs might prevent the losses of the requesting party before the final award is rendered.[206]On the other hand, interim measures may be even more important than awards since action or inaction of a reluctant party may render the final award useless for the party winning the case. The introduction of new procedural mechanisms which are modeled on UNICTRAL rules and some of leading international arbitral institution by the arbitral institution of the chambers is very essential to improve the alternative private justice system. However, in situation where such newly introduced arbitral procedures contradict with the legislation enacted by the law making organ of the country, the party opposing the arbitral rules of the institution may challenge their legality before courts. So, such problems are required to be solved by enacting modern arbitration laws modeled in international convention such as UNICTRAL and convention on the settlement of investment disputes.

III. The legal and practical experiences of the arbitral proceeding for construction disputes in institutional arbitrations of Ethiopia; The case of AACCSA-AI.

The law clearly provides as arbitral tribunals are required to follow the procedures prescribed by the civil code. Specifically, article 317(1) of the Civil Procedure Code stipulates as arbitration tribunals conduct their proceeding in a much similar way with the procedure of

[204] AACCSA-AI, Article 16 and ECCSA-AI, Article 28. The interim or conservatory measures which have been taken by the arbitral institution mostly face enforcement problems. Due to this the parties will resort to court at early stage of the arbitration seeking enforcement of protective and conservative measures.

[205]International arbitration tribunals can award interim injunctive relief. For instance ICC Rules, Article 28; ICDR Rules, Article 6; LCIA Rules, Article 25; UNCITRAL Rules, Article 26; SCC Rules, Article 37 & Appendix II; SIAC Rules, Rule 30; HKIAC Rules, Article 23).

[206]Ozen Atlıhan, The Main Principles Governing Interim Measures In The Pre-Arbitral Proceedings – Specifically, The ICC Emergency Arbitrator Rules (2012), p. 208.

Civil Court regardless of the kinds of arbitration. The arbitral institutions of both AACCSA and ECCSA have their own rules of conducting the arbitral proceedings. It seems that they have followed a more liberal approach of conducting the arbitral proceeding than that of public courts. Accordingly, their rules provide as arbitral tribunals are free to conduct the arbitration proceeding in a manner they consider, appropriate as long as the parties are treated with equality and full opportunity of presenting their case at every stage of the proceeding.[207] However, both the Civil Code and the Civil Procedure Code require arbitral tribunal to follow as near as the same procedure to that of Civil courts.[208]

The practice of arbitral proceedings in AACCSA-AI shows as the tribunal proceedings are more flexible and focused on finding solutions for the disputes occurred between the business communities.[209] When tribunals are established as per the rules of the arbitral institute of the chamber, the tribunal may decide to hear witness's listed by the parties or any other person if any of the parties' requests.[210] After consulting the parties, the arbitral tribunal may appoint one or more experts defining their terms of reference and receive their report. The arbitral rules empower the arbitration panel to summon any party and witness to provide evidence. But in practice, there is unwillingness from the individuals to appear before the arbitral panel without a court order.[211] Most of the time summoning witness, ordering the production of evidence and injunction orders requires the order of courts.[212]The arbitral centers repeatedly face a problem of enforcing their order for facilitating the proceeding and ensuring justice.[213]There should be some supportive legally coercive measure which obliges all persons to comply with the order of legally established arbitration centers in the country. In practice, opening file, presenting the case to courts and receiving order takes longer time disrupting the arbitration process and taking more time.

In the arbitral hearing, mainly in construction arbitration, there are a lot of procedural issues which are frequently happening. For instance the international trend shows that request for third party intervention and joinder of claims in construction dispute arbitration is

[207] The 2008 revised arbitration rules of AACCSA-AI, Article 17(1) and ECCSA-AI, arbitration rules, article 18.
[208] The 1960 Ethiopian Civil Code, supra note 127, article 3345 and the 1965 Civil Procedure Code of the Empire of Ethiopia, supra note 125, article 317.
[209]Interview conducted with Yohannes W/Gebreil, Director of the AACCSA-AI, cited above at note 183.
[210] The 2008 revised arbitration rules of AACCSA-AI, article 26.2.
[211] Interview conducted with Yohannes W/Gebreil, Director of the AACCSA-AI, cited above at note 183.
[212] Ibid.
[213] Ibid.

common.[214] However, the rules of the two arbitral institutions of the country don't regulate third-party intervention and joinder of third parties in their rules. The two arbitral institution rules also lacks rules in which the arbitral tribunal notifies the indispensable party for requesting whether he has the interest to intervene as either plaintiff or defendant in the arbitration cases.

IV. **The legal and practical experiences of giving an arbitral award in institutional arbitration of Ethiopia for construction disputes; the case of AACCSA-AI.**

The Civil Procedure Code states as an arbitral award are required to be made as a court judgment and shall deal with the question of costs. Similar to article 181 of the Civil Procedure Code the arbitral rules of both chambers of commerce arbitration centers require the award to be made in writing, to be signed by the arbitrators having the date on which and the place where the award is made. The ACCSA-AI arbitration rule provides as the award shall be final and binding, unless the parties agree otherwise before the commencement of the arbitration. Unless the parties have prior knowledge of the rules, the provision which describes the arbitral decision as final can be challenged by the parties.[215] However, in practice, the arbitral institute prepares a form and makes the parties put their signature showing as they are agreed to abide by the rules of the institute.

V. The legal and practical experiences of recognizing and enforcing arbitral awards in Ethiopia.

Article319(2) of the civil procedure code stipulate as an arbitral award is going to be executed in the same form as an ordinary judgment upon the application of the successful party for the homologation of the award and its execution.[216] Here the code seems as the application for recognition and enforcement of arbitral award is required to be brought together. In one case, the federal high court has decided as the application for recognition of arbitral award is required to be brought together with enforcement request.[217]

---

[214]Starvos Brekoulakis and David Brynmor Thomas, Subcontracts and Multiparty Arbitration in Construction Disputes, Global arbitration review, the guide to construction Arbitration, 2017, p. 93.

[215] The 2008 revised arbitration rules of AACCSA-AI, article 32.

[216] The federal Supreme Court Cassation Bench in its file No. 27574 on the case between Miss. Alemitu. Terefe and Yetigil fire libs sifet Mahiber gave a decision emphasizing as arbitral awards are required to be enforced similarly as court judgments.

[217] Federal High court, Lideta bench in its file No. 177845 on the case of Mis. Buzayehu Tadese Et al ruled as it has no legal power to recognize foreign judgment considering the legality of a foreign judgment. The court power is to execute foreign judgment considering its legality.

Relatively Local arbitral awards are enforceable similarly with court judgment unless they are set aside and repealed by appellate court. Similarly, since Ethiopia has recently ratified the New York convention on the recognition and enforcement of arbitral award, foreign arbitral awards given in the contracting state of the convention will be enforced in the same manner as domestic court judgments. However, in case of foreign arbitral award coming from non contracting state of the New York Convention, still enforcement of foreign arbitral awards is subjected to strong preconditions[218]. As per article 461 of the civil procedure code describes foreign arbitral awards are not enforceable unless, reciprocity is ensured as provided in art.458, the award has been made following a regular arbitration agreement or other legal act in accordance with the law of the country where it was made, the parties have had equal rights in appointing the arbitrators and they have been summoned to attend the proceedings, the arbitration tribunal was regularly constituted and the award does not relate to matters which under the provisions of Ethiopian laws could not be submitted to arbitration or is not contrary to public order or morals, the award is of such nature as to be enforceable on the condition laid down in Ethiopian laws.

The party seeking enforcement of foreign arbitral award may bring authenticated documents showing as the arbitral award fulfills the entire legal requirement of the nation where the award is given. However, in practice reciprocity has been the main requirement and challenge for the enforcement of foreign arbitral award. When any enforcement of arbitral award is requested, after making prima facial scrutiny on the legality of the award, the court will give order to the ministry of foreign affairs to assure as whether there is a bilateral agreement signed and ratified between Ethiopia and the country where the award is made.To resolve the problem of reciprocity Ethiopian courts will use two approach solutions. The first one is checking the existence of treaty b/n Ethiopia and the country where the award is given. The second approach is shifting the burden of proof to the award creditor to show and proof as a judgment given in Ethiopia is enforced in the country where the award is given. So checking the existence of the two requirements has been basically used to solve the problem of reciprocity raised by the parties'.

[218] Since the number of the contracting states of the New York convention has reached 165 countries, there will be a wider probability of implementing foreign arbitral award coming from foreign arbitral tribunals to Ethiopia.

Chapter Four

4. Conclusion and Recommendation

4.2. Conclusion.

From all the literatures, laws, primary data's and analysis of the practice of resolution of construction disputes through institutional arbitration in Ethiopia, the study can draw the following main conclusion:-

1. The unique feature of construction sector and its disputes has demanded and generated sector-specific dispute resolution systems such as Dispute Resolution Advisor (DRA), Dispute Review Board (DRB) and Dispute Adjudication Board (DAB). Due to the special feature of the sector dispute, most international standard conditions of construction contract recommend arbitration as the final preferred option for resolution of construction dispute after following these multi-tier dispute resolution options.
2. The arbitration of construction dispute commonly shares some basic features. Relatively they involve larger amount of money having multiple interested parties with independent contractual relationships and multiple claims requiring the joinder or consolidation of parties, they require expert arbitrators, involve large volume of document as evidence, they require the rapid resolution of certain time-sensitive issues which are sometimes vital for the success of a project and mostly requiring the interim and protective measures of the tribunal.
3. The international trend shows as arbitration is the most preferred option for the final resolution of the construction sector disputes. The experience of well known international arbitration institution also reveals that construction sector disputes are among the top number of cases adjudicated by their institution. The national practice of the arbitration centers in Ethiopia also indicates as the number of construction dispute arbitrated is significantly higher than any other sector specific disputes.
4. The study concludes that, in Ethiopia arbitration is among one of the unregulated part of the legal system. There are no supportive policies and laws to establish and operate arbitral institutions for private professionals and partners. Except the recent ratification of the New York convention on the recognition and enforcement of

arbitral award, only few provisions of the 1960th Ethiopian Civil Code and Civil Procedure Code deals with arbitration. The existing laws are insufficient and not comprehensive to properly back the growing complex commercial arbitration like construction arbitration as one means of alternative private justice system in the country.

5. In practice, the non empowerment of the arbitral tribunal's by Ethiopian laws to decide on the existence and validity of arbitral agreement highly affected the very purpose of arbitration by pushing arbitration cases to the full court trial and litigation. Therefore, the existing gap of the law regulating arbitration has caused an early and unnecessary intervention of courts in arbitration hampering the very purpose of arbitration.
6. Relative to the country's population and the importance of modern commercial arbitration, Institutional commercial arbitration in Ethiopia is at the early of its infant stage and not yet developed. There are only three institutional arbitration centers in Ethiopia. Two of them are established within the past two years and even they are not as such known to the public. Still they are dealing with less than five arbitration cases. Relatively the publicly known arbitration centre of Addis Ababa Chamber of Commerce and Sectoral Association has an eighteen years old age and engaged with more few number of arbitration cases. However, the number of cases handled per year has not yet passed forty in number. Out of these cases significant number of the cases nearly half of them are construction dispute arbitration. In one side this indicates as there is relatively an increasing demand of institutional arbitration for resolving construction disputes.
7. The reluctance of parties in respecting their contractual promise to solve their disputes through arbitral tribunal as per their agreement is one of the common challenges faced by the arbitral institution of AACCSA-AI. The arbitral institutions of the country lack the power to compel parties to respect their contractual commitment of solving disputes by arbitration. In practice, ambiguity of arbitral submission or clause also raises the issue of whether some disputes are under the jurisdiction of the arbitral panel. It has been one of the common challenges which the arbitration panel administered by arbitration institution is still facing. The other critical problem identified by the study during construction dispute arbitration of the

arbitration institution is the non enforcement of the arbitral order given for the purpose of temporarily securing and protecting rights of the parties at dispute.

8. The two arbitral institution rules do not sufficiently regulate some basic issues which are important for resolution of construction disputes. For instance the arbitral rules of both arbitration centers do not regulate third-party intervention and joinder of third parties. The two arbitral institution rules also lacks rules in which the arbitral tribunal notifies the indispensable party for requesting whether he/she has the interest to intervene as either plaintiff or defendant in the arbitration cases.
9. In practice parties participating in the arbitral proceeding of construction disputes conducted at AACCSA-AI highly depend and attempt to strictly follow the civil procedure rules. Mainly parties to the arbitral proceeding try to strictly enforce the civil procedure rules by referring different provisions of the civil procedure code in their statement of claim, statement of defense and in the whole arbitral proceeding. The practice of fixing the arbitral procedure through parties' agreement is not well developed.
10. In Ethiopia, enforcement of foreign arbitral award has been subjected to strong preconditions making their enforcement challenging and tiresome. However, the recent ratification of the New York convention is assumed as one of the milestone acts for the future smooth recognition and enforcement of international commercial arbitration awards.

4.3. Recommendation

After thoroughly examining the law and practice of institutional arbitration of construction dispute in Ethiopia; the main policy, legal and practical gaps are identified. Basing on the identified policy, legal and practical challenges the following recommendations are suggested to significantly minimize the problems:-

1. Creating the awareness of the public, increasing the public participation in alternative private justice system, setting a public policy which encourages and supports private justice system in general and that of institutional arbitration for both national and international commercial transaction disputes has to be an immediate priority action for the government.

2. Secondly, the government has to enact comprehensive legislation governing institutional arbitration of commercial disputes taking the international experience in to account and taking in to consideration the local context of the country.
3. Considering the unique features of construction sector and for the effective resolution of construction disputes, the government has to develop appropriate multi –tier alternative dispute resolution clauses such as Dispute Resolution Advisor (DRA), Dispute Review Board (DRB), and Dispute Adjudication Board (DAB) together with that of arbitration in its standard conditions of construction contract. At least the government has to use such important dispute resolution mechanisms for mega construction projects and projects involving significant amount of resource.
4. Taking the initiation of the government as one important mile stone act in ratifying the 1958 New York Convention on the recognition and enforcement of foreign arbitral award, the government has to also ratify widely implemented international arbitration laws such as UNICTRAL and Convention on the settlement of investment disputes by making the required reservation to keep the special interest of the country. Furthermore, Since Ethiopia is a seat for African Union, the country has to aspire and work to serve as a seat of arbitration for the continent and the rest of the world.
5. Since the existing arbitration centers are not sufficient for a country like Ethiopia which have more than one Hundred million population, both the government and relevant professional association and the trade community are required to work together to increase their numbers and capacity. The existing arbitration centers in the country are also required to create clear public awareness on the purpose and nature of commercial dispute arbitration including that of construction dispute arbitration.
6. Arbitral institutions of the country have to endorse industry-specific dispute resolution procedures and rules for the effective arbitration of construction disputes taking in to account the sector peculiar features.

Bibliography

I. Books.

1. Cyril Chern, Dispute Board Practice and Procedure, Informa law, Third Edition, 2015.
2. Cyril Chern, Dispute Boards Practice and Procedure, Blackwell publishing, First edition, 2008.
3. David Kiefer and Adrian Cole, Suitability of Arbitration Rules for Construction Disputes, the guide to construction Arbitration, Global arbitration review, 2017.
4. Edwin H.W. Chan and Henry C.H. Suen, Dispute Resolution Management for International Construction Projects in China,www.emeraldinsight.com/0025-1747.htm, 2004.
5. Kurt Dettman and Christopher Miers, Dispute Review Boards and Dispute Adjudication Boards: Comparison and Commentary ,Dispute resolution board foundation, February 2012.
6. Peter Fenn and Rod Gameson, Construction conflict management and resolution, University of Manchester Institute of Science and Technology (UMIST), Published by E & F N Spon, an imprint of Chapman & Hall, 1992.
7. Starvos Brekoulakis and David Brynmor Thomas, Subcontracts and Multiparty Arbitration in Construction Disputes, the guide to construction Arbitration, Global arbitration review, 2017.
8. SundraRajoo, Arbitration in the construction industry, Master Builders.

II. Articles in Journal or Magazine and Archives.

9. Abebe Dinku and Girmay Kahssay, "Claims in international construction projects in Ethiopia and case studies in selected projects", Department of Civil Engineering Addis Ababa University, Journal of EEA, Vol 20, 2003.
10. Admasu Shiferaw, "Productive Capacity and Economic Growth in Ethiopia", Department of Economic & Social Affairs, College of William and Mary Williamsburg, Virginia, April 2017.
11. A. Holt Gwyn, "Arbitration of Construction Disputes", College of Commercial Arbitrators, 2017.
12. Elsin Tas and Ozge Frtina, "The use of dispute review boards in construction projects: A comparison of Turkey, UK and US", ITU A|Z, Vol 12, No 2, July 2015.

13. Eugenio Zoppis, "DAB and dispute resolution under the 2017FIDIC forms of contract", Center for Construction Law and Dispute Resolution King's College, London, September, 2018.

14. Falilat Olubunmi Idowuetal, "An Evaluation of the use of ADR in the Nigerian Public Construction Project Disputes"**,** International Journal of Sustainable Construction Engineering & Technology (ISSN: 2180-3242), Vol 6, No 1, 2015.

15. Feigerlova, Monika,"Emergency Measures of Protection in International Arbitration", International and Comparative Law Review, 2018, vol. 18, no. 1.

16. Hailegabriel G. Feyissa, "the role of Ethiopian courts in commercial arbitration", Mizan law review, Vol. 4 No.2, Autumn, 2010.

17. James J. Myers, "International Construction Dispute Resolutions and New Alternatives", Constr. Law. 1985.

18. Kurt Dettman and Christopher Miers, "Dispute Review Boards and Dispute Adjudication Boards: Comparison and Commentary", Dispute Resolution Board Foundation, February 2012.

19. Lew, Julian D M. "Does National Court Involvement Undermine the International Arbitration Processes?" American University International Law Review, Vol 24, no. 3 (2009).

20. Michael J. Elliott, "Arbitration and the Construction Industry", 3 Glendale L. Rev, Vol, 29 (1978).

21. Oladinrin, T. O., Ogunsemi, D. R. and Aje, I. O, "role of construction sector in economic growth, empirical evidence from Nigeria", Futy Journal of the Environment , Vol. 7, No. 1, July 2012.

22. Owolabi James D, Amusan Lekan M, et al, "Causes and Effect of Delay on Project Construction Delivery Time", International Journal of Education and Research, Vol. 2 No. 4 April 2014.

23. Ozen Atlıhan, "The Main Principles Governing Interim Measures In The Pre-Arbitral Proceedings Specifically, The ICC Emergency Arbitrator Rules", Annales XLIII, N. 60, ,2012.

24. Sagar Soni, Mukesh Pandey and Sohit Agrawal, "Conflicts and Disputes in Construction Projects: An Overview", International Journal of Engineering Research and Applications, July 2017.

25. Seid Demeke Mekonnen, "Court Review of Arbitral Awards through the Power of Cassation:A Case Comment on National Mineral Corp. Pvt. Ltd. Co. v. Danni Drilling Pvt. Ltd. Co", Mekelle University Law Journal, Vol.3 No. 1, 2015.
26. Tadesse Ayalew Etal, "Assessment on Performance and Challenges of Ethiopian Construction Industry", Journal of Architecture and Civil Engineering, Volume 2, issue 11, 2016.

III. Unpublished Materials

27. Badmos-Raji Barakah A, the conceptual framework of modern construction dispute resolution in Nigerian construction industry.
28. Doaa Khalil Yousef Abu Jbara, evaluation and improvement of arbitration procedures in the engineering arbitration centre in the Gaza strip, The Islamic University-Gaza Deanery of Higher Studies Faculty of Engineering, 2012.
29. Donald Charrett (Dr), Dispute Boards and Construction contracts, The Victorian Bar, Continuing Professional Development Program, October 20, 2009.
30. Kariuki Muigua, Reawakening arbitral institutions for development of arbitration in Africa, Paper presented at Arbitration institutions in Africa conference, 2015.
31. Marzooq Abdul Karim Selam, The dispute in the construction industry in the Kingdom of Bahrain with a view to developing a dispute mitigation strategy, MSC thesis submitted at University of Salford, 2014-2015.
32. Mayer Brown, International Arbitration in Africa, Growth, developments and trends, 2017.
33. Nishith Desai Associates, Construction disputes in India, April, 2020.
34. Noor Mohamed MohmedNihaaj, Critical analysis of Arbitration method used in the construction industry in Sirilanka, Department of Civil Engineering University of Moratuwa, Sri Lanka, thesis for Master of Science in Construction Project Management.
35. Queen Marry University of London and Pinsent Masons LLP, International Arbitration Survey –Driving Efficiency in International Construction Disputes , How can international construction disputes be resolved more efficiently whilst maintaining fairness and access to justice? 2019.
36. Queen Mary University of London School of International Arbitration and White & Case, International arbitration survey 2018, the evolution of international arbitration.

37. Samer MA Sadek, Managing Standard Construction Contractual Forms Modifications in the Middle East- Overview and Recommendations, School of Built Environment, University of Salford, UK, A study submitted in Partial Fulfillment of the Requirements of the Degree of Doctor of Philosophy, June 2016.

38. Sayed-Gharib, T, Price, A. and Lord, W, Improving Dispute Resolution on Construction Projects in Kuwait.

39. The Dispute Board Federation, the use of dispute board in public private partnership, 2013.

40. Vincent Leloup, Standing Dispute Boards from the England and Wales perspective, Should they be adopted in England and Wales on major projects? And if so, would this require amending the legislation currently in force? 2016.

IV. International and National Laws

1. Civil Procedure Code of the Empire of Ethiopia, Negarit gazette, extraordinary issue No.3 of 1965, Addis Ababa, 1965.
2. Civil Code of the Empire of Ethiopia, Negarit gazzette –proclamation No 165 of 1960, Addis Ababa, 1960.
3. Proclamation of the constitution of the Federal Democratic Republic of Ethiopia, Proclamation No 1/1995, 1st year No.1, August 21, 1995.
4. Proclamation for the ratification of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Negarit Gazette, Proclamation No. 1184/2020 on 13th of March 2020.

V. International and National standard conditions of construction contract

1. African development bank, Rules and procedures for procurement of goods and works, revised July 2012 edition.
2. BATCoDA, standard conditions of consulting services for design and supervision of construction works, January 1990.
3. FIDIC, conditions of contract for construction, 2nd edition, 2017, published by international federation of consulting engineers.
4. World Bank Standard Bidding documents for Work, January, 2017.

5. The standard conditions of contract for construction of civil work projects that was authored by the Ministry of Works and Urban Development in May 1994.
6. The standard bidding document for the procurement of works, issued by the Public Procurement and Property Administration Agency (PPPA), August 2011.
7. The American Institute of Architect General Conditions of Contract for Construction (AIA's A201 - 2007 General Conditions of the Contract for Construction).

VI. Arbitration and court cases

1. The case b/n Daniel Birehane General contractor and Electric Power Corporation the Addis Ababa chamber of commerce arbitration centre, AACCSA-AI at file No /19/80/2005.
2. The federal Supreme Court cassation bench, file No. 27574, on the case between Miss. Alemitu. Terefe and Yetigil fire libs sifetMahiber.
3. Federal High court, Lideta bench, file No. 177845 on the case of Mis. Buzayehu TadeseEt al

VII. Interviews.

1. Interview conducted with Selam Setegn, Director of the arbitration institute of Ethiopian Chamber of Commerce and Sectoral Association. The interview is conducted in the office of the director located in front of Federal police head quarter building, "Mexico".
2. Interview conducted with Yohannes W/gebreil, Director of the Arbitration Institute of Addis Ababa Chamber of Commerce and Sectoral Association. The interview is conducted in the office of the director located in front of Federal police head quarter building, "Mexico".
3. Interview conducted with Professor Zekarias Kenea(Addis Ababa university school of law).
4. Interview conducted with Fasil Tadese (legal advocate and experienced construction dispute arbitrator)
5. The interview made with highly experienced Federal High Court Judges of Lideta Civil Bench (Justice Nuredin Kedir, justice Seble Kinfe, Justice Yakob Mekuriya, Justice Yosef Mohammed, Justice Adem Seid and three other anonymous Justices)

6. Interview conducted with Haregeweyin Ashenafi, currently working as Executive Director at Ethiopian Center for Development, the interview is conducted in the office of Ethiopian Center for Development located at Bole Alem Building 6th floor.